Supreme Court, U.S.
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No. 03-

IN THE
Supreme Court of the United States

FREEDOM NY, INC.,

Petitioner,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Federal Circuit may set aside findings of fact made by the Armed Services Board of Contract Appeals after an 11-day evidentiary hearing if such findings are explicitly based on a credibility determination that accepts the testimony of the petitioner's president and its military consultant and expressly rejects as not credible the conflicting testimony of the Procurement Contracting Officer.

2. Whether the Court of Appeals for the Federal Circuit may set aside findings of fact made by the Armed Services Board of Contract Appeals without determining, as 41 U.S.C. § 609(b) prescribes, that the findings are "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith" or that the ASBCA decision "is not supported by substantial evidence."

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or subsidiaries.

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FREEDOM NY, INC.,

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DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-26a, *infra*) is reported at 329 F.3d 1320 (Fed. Cir. 2003). The opinion of the court of appeals on petition for rehearing (App. B, pp. 27a-31a, *infra*) is reported at 346 F.3d 1359 (Fed. Cir. 2003). The decision of the Armed Services Board

of Contract Appeals (App. C, pp. 32a-100a, *infra*) is reported at 01-2 BCA ¶31,586.

JURISDICTION

The court of appeals' judgment was entered on May 22, 2003. A timely petition for rehearing was denied on October 10, 2003. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The applicable standard for judicial review of decisions of the Armed Services Board of Contract Appeals is set forth in 41 U.S.C. § 609(b) which provides:

> (b) Finality of board decision
>
> In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

STATEMENT

1. Background

This lawsuit grows out of a contract that the Defense Logistics Agency ("DLA") made with petitioner in November 1984 to purchase Meals, Ready-to-Eat ("MRE") combat rations for the United States military.[1] The government improperly terminated the contract for default in 1987, and the default termination was converted, after a decision of the Armed Services Board of Contract Appeals ("ASBCA"), to "termination for the convenience of the government." JA372-74;[2] ASBCA No. 35671, 96-2 BCA ¶28,328. In 1991 petitioner filed a claim for almost $22 million in damages. JA27. Petitioner alleged that it had been prevented from performing under the contract (and was ultimately driven out of business) by repeated government payment delays, withholdings, suspensions and invalid deductions from progress payments that were due. The government defended on the ground that petitioner had repeatedly missed contract deadlines.

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[1] Although petitioner qualified under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), as a "socially and economically disadvantaged business concern" because its president and primary stockholder is African-American, the 1984 contract was not awarded under Section 8(a). In May 1986, however, as is described at p. 5, *infra,* the government undertook to assist petitioner "in obtaining traypack and pouch contracts through the Small Business Administration's 8(A) Program."

[2] "JA" refers to the Joint Appendix in the Court of Appeals for the Federal Circuit.

Over the duration of the contract, many conflicting allegations regarding payment and performance were made by the parties. These allegations resulted in a substantial number of "Modifications" that resolved or preserved the competing positions. This Petition concerns only Modification No. 25, signed on May 29, 1986.

2. The Decision of the Armed Services Board of Contract Appeals

Petitioner's breach-of-contract claim was tried in December 2000 before the Armed Services Board of Contract Appeals ("the ASBCA") in an 11-day hearing. In a 43-page decision rendered on August 28, 2001, three judges of the ASBCA (one of whom had conducted the hearing) found that the government had committed more than two dozen breaches of the contract, 21 of which involved a failure to make progress payments when due or not at all (App. C, pp. 32a-100a, *infra*). The ASBCA granted petitioner a recovery of $5,907,654 plus more than $4 million in interest. App. C, pp. 98a-99a.

3. Modification No. 25

On April 24, 1986, petitioner submitted a certified claim which alleged, *inter alia,* that the government had failed to make full and prompt progress payments and had interfered with timely performance of the contract by the petitioner. The government asserted before the ASBCA that petitioner released this claim with Modification No. 25, which was signed by the parties on May 29, 1986. Petitioner's president, Henry Thomas, testified that he signed Modification No. 25 only after the government agreed to the

terms of a letter dated May 13, 1986, *that was physically attached to the signed copy of Modification No. 25*, and that had been faxed by Procurement Contracting Officer ("PCO") Frank Bankoff to the Defense Logistics Agency ("DLA") for its approval prior to the signing. Petitioner's consultant, retired U.S. Army Colonel Frank Francois, who was also present at the signing of Modification No. 25, corroborated Mr. Thomas' testimony. The relevant portions of their testimony appear as Appendices D and E, pp. 101a-114a, *infra*.

The May 13 letter – which, with minor corrections, was identical to a letter dated May 28, 1986, that Mr. Thomas brought to the May 29 meeting – agreed to waive petitioner's claim in exchange for a commitment by DLA (1) to process a $2.7 million loan for petitioner, (2) to negotiate another MRE contract with petitioner, and (3) to assist petitioner in obtaining other contracts under the Small Business Administration's Section 8(a) program. A copy of the May 13 letter – which had a fax legend establishing that it was sent at 11:00 a.m. on May 29 from the Defense Personnel Support Center – is Appendix F hereto, pp. 115a-119a, *infra*. The ASBCA concluded in paragraph 93 of its Findings of Fact (App. C, pp. 64a-65a, *infra*):

> On 29 May 1986, Henry Thomas and consultant Francois met with PCO Bankoff. Mr. Thomas had a 28 May 1986 letter to DLA's R. Chiesa (ex. G-40), conforming in substance to the 2 May 1986 version, attached to proposed Modification No. P00025 (P00025). Mr. Bankoff saw the 28 May date of that letter, and provided an essentially identical FNY 13 May 1986 letter to Mr.

> Chiesa, which Mr. Thomas attached to Modification No. P00025. Mr. Bankoff said that he would send that letter to Mr. Chiesa for approval. At 11:00 a.m. DPSC telefaxed to DLA headquarters a copy of the signed 13 May letter. Mr. Thomas heard no objection to the 13 May letter, understood that Mr. Chiesa had agreed, and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025. (AR4, tab M25; ex. FT280; tr. 643-51, 2047-49)

PCO Bankoff denied in his testimony that the May 13 letter was part of Modification No. 25. The relevant portion of Bankoff's testimony is reproduced as Appendix G, pp. 120a-129a, *infra.* The ASBCA concluded in paragraph 94 of its Findings of Fact (App. C, p. 65a, *infra*):

> According to Mr. Bankoff, on 29 May 1986 he told FNY that he knew nothing of any side agreement FNY made with DLA: '"There is no side agreement. There is no attachment to the modification. There is no addendums. [sic] . . .' And then it was like, 'Forget it. We won't sign the mod.'" (tr. 1267-71, 1386). Considering the documents in evidence and Mr. Bankoff's demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony, we attach no probative weight to Mr. Bankoff's denial of the "side agreement" attached to P00025.

As a result of these Findings of Fact, the ASBCA concluded that since the DLA "did not fulfill its duties under the side agreement," it could not enforce Modification No. 25. App. C, pp. 93a-94a, *infra.*

4. The Government's Appeal

The government took an appeal to the Court of Appeals for the Federal Circuit in which it challenged the ASBCA's conclusion that a different Modification – No. 29 – had been procured by the duress of improperly withholding substantial progress payments. The government did not separately challenge the ASBCA's conclusion regarding Modification No. 25.

In its principal brief to the Federal Circuit, the government recited the testimony of PCO Bankoff without indicating that this testimony had been explicitly rejected by the ASBCA. Brief for Appellant, Fed. Cir. Nos. 02-1105, 02-1130, p. 16. The government did not claim in its principal brief that the "side agreement" that had been attached to Modification No. 25 was superseded or invalidated by any "integration clause." Petitioner's principal brief noted that the ASBCA "found that the testimony of the PCO denying the existence of an agreement was not probative because it was 'evasive, argumentative, and ambiguous' and plagued with 'persistently selective recall of facts.'" Brief for Appellee, Fed. Cir. Nos. 02-1105, 02-1130, pp. 54-55. The government's reply brief quoted the language in Modification No. 25 that read: "Both parties expressly state that the aforesaid recitals are the complete and total terms and conditions of their Agreement and that this Agreement has been entered into free from duress or coercion." The

government then asserted for the first time in its reply brief that "the ASBCA erred in not holding that any alleged oral side agreement is a nullity." Reply Brief for the Appellant, Fed. Cir. Nos. 02-1105, 02-1130, p. 8. In its reply brief petitioner noted again that the ASBCA had "specifically *dis*believed the PCO's testimony on the side agreement" and that this made the ASBCA's decision "'virtually unreviewable' on appeal." Appellee's Reply Brief, Nos. 02-1105, 02-1130, p. 6 n. 2 (emphasis original).

5. The Federal Circuit's Initial Decision

The court below affirmed the ASBCA finding that Modification No. 29 was invalid because it was signed under duress. App. A, pp. 17a-21a, *infra*. But with regard to Modification No. 25, the court of appeals held that the language that recited that it was "the complete and total terms of their Agreement" was an "integration clause" which permitted the addition of "no additional terms . . . through parol evidence." App. A, p. 17a, *infra*. The court said that it could review the ASCBA's conclusion on this subject "without deference" to the findings of the ASBCA. *Id.* at 14a. Accordingly, the court below reversed the ASBCA's decision invalidating Modification No. 25. *Id.* at 17a.

6. The Petition for Rehearing

Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc calling attention to Findings of Fact 93 and 94 and to the ASBCA's finding that the May 13, 1986, "side letter" was physically attached to Modification No. 25. On July 16, 2003, the court of appeals asked the government to respond to the petition. The government's response asserted that it was "irrelevant"

whether the May 13 letter was physically attached to Modification No. 25. Response of the Appellant to Petition for Rehearing, Fed. Cir. Nos. 02-1105, 02-1130, p. 6. The government did not claim that Mr. Thomas had attached the May 13 letter *only* to his copy or that petitioner had, in any manner, "waived" the contention it made in the petition for rehearing.

7. The Denial of Rehearing

The panel of the Federal Circuit issued a Per Curiam opinion denying rehearing on the following grounds: (1) The panel said that petitioner had "waived" the arguments made in the petition for rehearing, citing decisions that deemed "waived" any issue "not raised by an appellant in its opening brief." App. B, p. 29a, *infra.* (2) The panel said that the ASBCA had found that Mr. Thomas "had attached the May 13 and May 28 letters (which were substantially identical) describing an alleged side agreement *to his copies of Modification 25*." *Id.* (emphasis added). (3) The panel also said that the May 13 and May 28 letters "expressly state that they are not part of Modification 25." *Id.* (emphasis original). The panel apparently overlooked (1) that petitioner could not have "waived" its argument because it was the appellee in the court of appeals, not the appellant, and that petitioner did, in any event, call attention to Findings of Fact 93 and 94 in petitioner's briefs, (2) that the ASBCA finding did not suggest that the copies of the "side agreement" letters were attached *only* to Mr. Thomas' copy of Modification 25 , and (3) that the May 13 and May 28 letters referred to Modification 25 (called Modification 21 in the earlier letter) and said explicitly that the terms of Modification No. 25 only reflected the settlement of the parties "in part."

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FEDERAL CIRCUIT REVERSING ASBCA FACT-FINDINGS BASED ON CREDIBILITY DETERMINATIONS CONFLICTS WITH DECISIONS OF THIS COURT AND OF MOST FEDERAL COURTS OF APPEALS

A. The Decision Below Conflicts With *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

In *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985), this Court reversed a Fourth Circuit decision that had overruled a district court's findings of fact that had been based, in part, on the court's appraisal of the credibility of witnesses. This Court articulated a legal principle of judicial review that has been cited and quoted numerous times (470 U.S. at 575):

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

The circumstances of this case are even more compelling than those in the *City of Bessemer* case for a number of reasons:

First, although a single administrative judge presided at the hearing and heard the witnesses, the ultimate credibility determinations made by the ASBCA are made by a panel of three judges. In this case, all three judges signed the decision, which included Findings 93 and 94. In the *City of Bessemer* case the credibility determination was made by a single district judge.

Second, the legal standard for judicial review of findings of fact is more restrictive under 41 U.S.C. § 609(b) (which governs review of ASBCA decisions) than it is under Fed. Rule of Civ. Proc. 52(a) (which governs decisions of district courts). Section 609(b) directs that decisions on questions of fact are not to be set aside "unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." Rule 52(a) appears to give appellate courts greater leeway than does 41 U.S.C. § 609(b) because it permits courts of appeal to set aside findings of fact that are "clearly erroneous" regardless of indicia of "bad faith" and only requires "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses."

Third, in the *City of Bessemer* case there was reason to view the district court's findings of fact with some skepticism because they largely adopted the substance of the plaintiff's proposed findings. See 470 U.S. at 571-573. In this case, the ASBCA judge who conducted the hearings prepared an extensive opinion with 133 separate Findings of Fact. Findings 93 and 94 were authored by Administrative Judge James, and they reflect "the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." 470 U.S. at 575.

They were clearly "the judge's own considered conclusions." 470 U.S. at 573.

Although no other decision of this Court has addressed the proper standard of review of credibility determinations as squarely as the *City of Bessemer* case, subsequent decisions of this Court have re-affirmed the principle of exceedingly limited review. See *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Concrete Pipe and Prods. of California, Inc. v. Construction Laborers Pension Trust of Southern California*, 508 U.S. 602, 623 (1993) ("in the usual case, the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example.").

B. The Decision Below Conflicts With Decisions of Most Federal Courts of Appeal.

The federal courts of appeal – including the Federal Circuit -- have, by and large, held repeatedly that findings of fact made in administrative proceedings, if based on credibility, "are virtually unreviewable on appeal." *E.g., Olson v. Department of Labor*, 60 Fed. Appx. 818, 820 (Fed. Cir. 2003); *Bieber v. Department of the Army*, 287 F.3d 1358, 1364 (Fed. Cir. 2002); *Barzey v. Department of Commerce*, 4 Fed. Appx. 766, 769 (Fed. Cir. 2001); *Mansour v. Immigration and Naturalization Service*, 230 F.3d 902, 906 (7th Cir. 2000); *National Labor Relations Board v. CWI of Maryland, Inc.*, 127 F.3d 319, 326 (4th Cir. 1997); *Golden Eagle Spotting Co. v. Brewery Drivers and Helpers*, 93 F.3d 468, 471 (8th Cir. 1996) ("We will not overturn Board findings that are based on credibility

determinations unless those findings shock the conscience."); *Cross Mountain Coal, Inc. v. Ward,* 93 F.3d 211, 218 (6th Cir. 1996); *Walnut Creek Honda Associates 2, Inc. v. National Labor Relations Board,* 89 F.3d 645, 648 (9th Cir. 1996); *Quazite Division of Morrison Molded Fiberglass Co. v. National Labor Relations Board,* 87 F.3d 493, 495 (D.C. Cir. 1996) ("the Court must uphold Board-approved credibility determinations of an ALJ unless they are hopelessly incredible or self-contradictory"); *Asarco, Inc. v. National Labor Relations Board,* 86 F.3d 1401, 1406 (5th Cir. 1996); *Ready Mixed Concrete Co. v. National Labor Relations Board,* 81 F.3d 1546, 1551 (10th Cir. 1996); *Kinney Drugs, Inc. v. National Labor Relations Board,* 74 F.3d 1419, 1427 (2d Cir. 1996).

The same legal principle has been applied under Fed. Rule Civ. Proc. 52(a) to credibility findings made by district courts. *E.g., Allen v. Iranon,* 283 F.3d 1070, 1078 n. 8 (9th Cir. 2002) ("A trial court's finding that a witness is not credible is entitled to special deference."); *United States v. Pedroza,* 269 F.3d 821, 826 (7th Cir. 2001) ("We give special deference to such credibility determinations, which can virtually never be clear error."); *American Valmar Int'l Ltd. v. Commissioner of Internal Revenue,* 229 F.3d 98, 101 (2d Cir. 2000) ("'particularly strong deference' is owed where the trial court bases its findings upon its determination of witnesses' credibility"); *Taylor v. Howe,* 225 F.3d 993, 1002 (8th Cir. 2000) ("findings based on credibility . . . must almost always be affirmed"); *Theriot v. Parish of Jefferson,* 185 F.3d 477, 490 (5th Cir. 1999), *cert. denied,* 529 U.S. 1129 (2000) ("A trial court's decision to credit the testimony of one, two, or more witnesses, each of whom has told a coherent, facially-plausible story that is not contradicted by extrinsic evidence, can virtually never be clear error.");

Johansen v. Combustion Engineering, Inc., 170 F.3d 1320, 1335 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999); *Dill v. City of Edmond*, 155 F.3d 1193, 1211 n. 9 (10th Cir. 1998); *Complaint of Nautilus Motor Tanker Co., Ltd.*, 85 F.3d 105, 116 (3d Cir. 1996) ("The district court's conclusions regarding such testimony, based on assessments of witness credibility, are deserving of the highest degree of appellate deference.").

II.

THE FEDERAL CIRCUIT'S DECISION MISAPPLIED BASIC PRINCIPLES OF CONTRACT LAW

The Federal Circuit's ruling that the presence of an "integration clause" in Modification No. 25 voided the terms specified in the May 13 letter was plainly in error. If the May 13 letter was, as the ASBCA found, approved by the government before Modification No. 25 was signed, and if petitioner's signature on Modification No. 25 was, as the ASBCA found, conditional on the government's acceptance of terms of a document which was physically attached to Modification No. 25, the "integration clause" did not nullify the May 13 letter. Indeed, "black-letter" contract law requires that the letter's terms be enforced as part of the settlement achieved by Modification No. 25.

Comment *e* to Section 216 of the *Restatement (Second) of Contracts* (1981) says that the presence of an integration (or "merger") clause "does not control the question whether the writing was assented to as an integrated agreement . . . ." The District of Columbia Circuit said in

Bowden v. United States, 106 F.3d 433, 440 (D.C. Cir. 1997): "While the presence of an integration clause suggests that the agreement is fully integrated, it does not by itself dictate that conclusion."

Comment *b* to Section 210 of the *Restatement* notes that "any relevant evidence" may be introduced to establish whether an agreement was or was not intended to be "completely integrated." The comment adds that "wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." Section 214 of the *Restatement* explicitly authorizes "agreements and negotiations prior to or contemporaneous with the adoption of a writing" to be introduced on the question whether the agreement is completely or partially integrated.

These *Restatement* rules and comments required consideration in this case of the testimony of Thomas and Francois because their testimony demonstrated that Modification No. 25 was only a "partially integrated" settlement agreement. Their testimony, if believed (as it was by the ASBCA), concerned "agreements and negotiations prior to or contemporaneous with the adoption" of Modification No. 25. The Modification was, according to their testimony, a "partially integrated" agreement which was complete only if combined with the letter of May 13, 1986.

Section 216 of the *Restatement* also permits testimony regarding "a consistent additional term" of an integrated agreement. On the facts of this case, the three obligations of DLA enumerated in the May 13 letter are "consistent additional terms."

Finally, even if Modification No. 25 were classified as a "completely integrated" agreement, Section 217 of the *Restatement* would require enforcement of the attached letter of May 13. Section 217 permits a party to an integrated agreement to prove "that performance of the agreement is subject to the occurrence of a stated condition." Mr. Thomas testified that there was an oral agreement that Modification No. 25 would become effective only if the government agreed to the terms of the May 13 letter. Hence that "oral requirement of a condition" (in the language of the *Restatement*) – which the ASBCA explicitly credited – was a prerequisite to the validity of Modification No. 25.

The Federal Circuit overlooked these provisions of the *Restatement (Second) of Contracts.* The court's opinion cited only comment *e* to Section 216, without mentioning the additional language we have quoted from that comment (App. A, p. 16a, n.3, *infra*), and it totally ignored the other sections of the *Restatement.* In denying the petition for rehearing, the panel referred only to Section 132 of the *Restatement.* That section concerns the Statute of Frauds, which was not in issue in this case.

Moreover, the reasons stated by the panel below for denying the petition for rehearing were patently erroneous. Since petitioner was the appellee in the Federal Circuit, it could not be held to have "waived" the arguments it presented in the petition for rehearing by failing to present them in the appellant's brief. In any event, petitioner relied in both of its briefs in the Federal Circuit on the Findings of Fact that it cited in its rehearing petition.

III.

THE FEDERAL CIRCUIT'S DECISION WILL AFFECT OTHER GOVERNMENT CONTRACT CASES

The language of Modification No. 25 that the panel below called an "integration clause" is language that is frequently inserted in government contract modifications. If the decision in this case is not reviewed and reversed, documents that have been attached in the past to contract modifications on the assumption that they thereby became part of the modification will suddenly be nullified and will not be binding on the government. This drastic shift in the expectation of the contracting parties should not take effect without careful scrutiny by this Court.

CONCLUSION

The Federal Circuit plainly erred when, in the face of contrary credibility findings by the ASBCA, it revived Modification No. 25 on the ground that an "integration clause" renders the "side agreement" described in the May 13 letter a nullity. That decision squarely conflicts with the well-established limited role that courts of appeals have under decisions of this Court and of other federal courts of appeal, and under the language of the governing statute. Consequently, this petition should be granted. Although granting this petition and giving the case plenary consideration would be warranted, this Court might choose to reverse the decision below summarily in light of *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985).

Respectfully submitted,

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Dated: January 2004

APPENDIX

APPENDIX A

United States Court of Appeals,
Federal Circuit.

Donald H. RUMSFELD, Secretary of Defense, Appellant,
v.
FREEDOM NY, INC., Appellee.
Freedom NY, Inc., Appellant,
v.
Donald H. Rumsfeld, Secretary of Defense, Appellee.

Nos. 02-1105, 02-1130.

DECIDED: May 22, 2003.

William K. Olivier, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for the Secretary of Defense. With him on the brief was David M. Cohen, Director.

Gilbert J. Ginsburg, of Washington, DC, argued for Freedom NY, Inc. Of counsel on the brief were Neil H. Ruttenberg, of Beltsville, MD; and Shlomo D. Katz, Epstein Becker & Green, P.C., of Washington, DC.

Before SCHALL, GAJARSA, and DYK, Circuit Judges.

DYK, Circuit Judge.

The Secretary of Defense ("government") appeals the Armed Services Board of Contract Appeals' ("Board's") decision holding invalid two settlement agreements (Modifications 25 and 29) between the government and the contractor and awarding a price adjustment pursuant to the

"Government Delay of Work" clause in the contract. *Freedom NY, Inc.*, ASBCA No. 43965, 01-2 B.C.A. (CCH) ¶ 31,585 at 156,043, 2001 WL 1143312 (2001). Freedom New York, Inc. ("contractor") cross appeals the Board's decision declining to find a cardinal change, bad faith, or constructive change (based on the contractor's inability to obtain state-of-the-art equipment, allegedly because of government actions), and declining to award consequential breach damages or additional interest the contractor now claims was due. We hold that the Board properly held that Modification 29 was invalid on grounds of duress but erred in holding Modification 25 ineffective because the government breached an alleged side agreement. In all other respects, we affirm. Thus, we affirm in part, reverse in part, and remand.

BACKGROUND

This contract dispute has a long and complex history which is fully recounted in the Board's decision. *Freedom NY*, 01-2 B.C.A.(CCH) at 156,045-061. We will summarize the portions relevant to this appeal.

The contractor's predecessor, Freedom Industries, Inc. ("FII"), was put on a list of approved producers of Meal, Ready to Eat ("MRE") combat rations in March of 1983 by the Defense Logistics Agency ("DLA") and the Defense Personnel Support Center ("DPSC") (collectively "government"). FII was awarded MRE contract No. DLA13H-85-C-0591, in the amount of $17.2 million, on November 15, 1984. This contract represented the contractor's only business, a fact known to the government. The government agreed to make progress payments in the amount of 95% of incurred costs.

The contractor agreed to process, assemble, and package MREs that contained twelve separately packaged menu items, some of which were to be provided by the government, others by the contractor. The final lot of MREs was due, F.O.B. Bronx, New York, on December 31, 1985, with progress payments to be made periodically. All costs were treated as direct; and, since this was the contractor's only contract, all costs were allocable to it.

The contract also incorporated several clauses from the Defense Acquisition Regulations ("DAR"), including two concerning the government's right to withhold progress payments for defaults by the contractor: "Progress Payments for Small Business Concerns" (32 C.F.R. § 7-104.35(b) (1982)) and "Progress Payments" (32 C.F.R. 7-2003.64 (1974)). The first of these clauses provided, in pertinent part:

> The Contracting Officer may reduce or suspend progress payments, or liquidate them at a rate higher than the percentage stated in (b) above [95%], or both, whenever he finds upon substantial evidence that the Contractor (i) has failed to comply with any material requirement of this contract, (ii) has failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of the contract, (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, (iv) is delinquent in payment of the costs of performance of this contract in the ordinary course of business, (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of

> this contract, or (vi) is realizing less profit than the estimated profit used for establishing a liquidation percentage in paragraph (b), if that liquidation percentage is less than the percentage stated in paragraph (a)(1).

32 C.F.R. § 7-104.35(b), ¶ (c) (1982). The second clause provided, in pertinent part::

> The appropriate "Progress Payment" clause ... included in the contract ... shall be inoperative during the time the contractor's accounting systems and controls are determined by the Government to be inadequate for segregation and accumulation of contract costs.

32 C.F.R. § 7-2003.64 (1974).

The contract did not run smoothly. The contractor repeatedly missed deadlines for delivery of the MRE's. The contractor claimed that the government was interfering with its ability to perform the contract by, among other things, failing to make timely progress payments. The government claimed that the contractor was in default, and thus repeatedly delayed progress payments, or failed to make them at all.

In one of many efforts to settle their respective claims, the contractor and the government negotiated Modification 25, which was signed by both parties on May 29, 1986. Among other things, it released the government from "all claims for all happenings and/or occurrences which have arisen to date under law and/or relating to the contract," except for a specific occurrence involving a subcontractor. *Freedom NY,* 01-2 B.C.A. (CCA) at 156,056. In return, the contractor received an extension of the delivery schedule and

a price adjustment. The modification contained an integration clause as follows: "Both parties expressly state that the aforesaid recitals are the complete and total terms and conditions of their Agreement." *Id.*

During the course of the negotiations concerning the modification, the government allegedly agreed to the provisions of a side agreement which was not included in the final document signed by both parties. This alleged side agreement was memorialized in two letters sent by the contractor along with what would become Modification 25. These letters were substantively identical, and both were sent before the execution of Modification 25 on May 29, 1986. The first letter was sent May 13, 1986; the second, which corrected some minor mistakes, was sent May 28, 1986. The letters both stated that the "settlement is reflected *in part* in the Contract Modification" and requested that the side agreement "be confirmed as soon as practical." (J.A. 298, 300, 301, 303) (emphasis added). This alleged side agreement consisted solely of promises supposedly made by the government, most importantly that, if the contractor were "otherwise qualified," the government would "negotiate a fair and reasonable contract" with the contractor for additional MRE's to be provided beginning in 1987. The government's only response was a May 30, 1986, letter which denied that such a side agreement existed, and it is undisputed that the government did not perform the promises allegedly made therein.

Modification 25 did not resolve the disputes between the contractor and the government, nor did Modifications 26, 27, or 28. The parties began negotiations for Modification 29 in the fall of 1986. While these negotiations were occurring, the administrative contracting officer approved progress payment 21, in the amount of $700,000, on October 3, 1986. An internal government memorandum recited that

"[c]onsidered in [the administrative contracting officer's] decision was the best interest of the Gov't., the contract loss ... progress payments and cases accepted to date ... disallowances and Modification [29]." Despite the administrative contracting officer's approval, and even though the government knew that the contractor was in financial distress, the government withheld progress payment 21 and informed the contractor that it would not make the payment until the contractor agreed to Modification 29. The contractor did so on October 7, 1986. Modification 29 released the government from "all manner of action, causes of action, suits, proceedings ... damages, claims, and demands whatsoever, in law or equity or under administrative proceedings," except for those related to Zyglo testing of the rations. *Freedom_NY,* 01-2 B.C.A. (CCA) at 156,057. In return, the government extended the delivery schedule by one month. *Id.*

The contract was terminated for default by the government in 1987. In 1991, the contractor brought a claim for breach of contract, constructive change, and improper termination for default before the contracting officer. This was denied, and the contractor appealed to the Board. The scope of the contractor's appeal--specifically, whether it was limited to determination of whether the government had properly terminated the contract for default, or whether it also included breach claims--was unclear. In May 1996 the Board held that the default termination had been improper. The default termination was therefore converted to a termination for convenience; the decision was, in this respect, favorable to the contractor. *Freedom NY, Inc.,* 96-2 B.C.A. (CCH) ¶ 28,328 at 141,479, 1996 WL 242320 (1996).

However, the Board also went on to deny the contractor's claims for breach of contract. In so doing, the

Board made determinations that were adverse to the contractor, including that the alleged side agreement was not part of Modification 25 and that Modification 29 was not obtained by duress. The contractor moved to vacate the portion of the decision that denied its contract claims on the ground that it had been surprised to its prejudice because it had not expected that the appeal would include a determination of its contract claims. In August 1996 the Board agreed with the contractor. *Freedom NY, Inc.*, ASBCA Nos. 35671 & 43965, 96-2 B.C.A. (CCH) ¶ 28,502 at 142,323, 1996 WL 478747 (1996). "From the moment [the appeal] was docketed there had been confusion as to the scope of the appeal," the Board held. *Id.* The Board therefore vacated the parts of its May 1996 decision that were related to the contract claims, including the determinations that the alleged side agreement was not part of Modification 25 and that Modification 29 had not been obtained by duress, and reinstated the contractor's appeal to that extent. *Id.* at 142,325. The Board also "correct[ed] the findings and conclusions of law" in its previous decision to the extent provided in an appendix, although it (apparently inadvertently) failed to remove some findings of fact that formed the basis of the parts of its decision that had been vacated. *Id.*

Thereafter, the parties stipulated to some facts, and an eleven-day trial was held to resolve the others. During the trial, the Board heard conflicting testimony about the alleged side agreement to Modification 25. Henry Thomas, the contractor's president, testified that the modification to which the contractor agreed was reflected only in part in the language of Modification 25; the rest of the agreement was reflected in the letters of May 13 and 28. He also testified that the contractor would not have agreed to Modification 25 without the alleged side agreement, and that the government knew this. When asked how he knew that the government

had agreed to the alleged side agreement, Thomas testified that the government was in possession of it and "[n]o one objected. Nobody sent me anything. Nobody called me. Nobody said anything." (Tr. at 650.) Colonel Frank Francois, a consultant hired by the contractor, testified that at the meeting when Modification 25 was signed (which he had attended), the procuring contracting officer told the contractor that he had approval to agree only to Modification 25. However, Francois testified that he (Francois) understood Modification 25 to include the alleged side agreement. The procuring contracting officer testified that, while he had received the letters, Modification 25, as written, contained the parties' complete agreement. He testified, "There is no side agreement. There is no attachment to the modification." *Freedom NY,* 02-1 B.C.A. (CCH) at 156,056. A letter from the executive director of contracting at DLA to the contractor on May 30, 1996, also denied that there was a side agreement, stating:

> [Y]our letter [of May 28] indicated that other parts of our agreement are not reflected in the contract modification. This is not correct. The agreement reached as a result of our discussion is contained in whole and in its entirety in the contract modification.

(J.A. at 308.)

In November of 2000, the parties settled the amount due for termination subject to any adjustment made as a result of the appeal pending before the Board.

On August 28, 2001, the Board rendered its decision. *Freedom NY,* 01-2 B.C.A. (CCH) at 156,043. It held that the government had breached the contract in several ways, including its repeated failure to make progress payments. *Id.*

at 156,061. The Board further held, contrary to its earlier vacated finding, that the alleged side agreement was part of Modification 25 and that the government had breached it. *Id.* at 156,066. It credited the testimony of Thomas and "attach[ed] no probative weight" to the contracting officer's testimony because of "the documents in evidence and [his] demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony." *Id.* at 156,056. Because it found the alleged side agreement to be part of Modification 25 and that it was breached, the Board held the release in Modification 25 could not be enforced. *Id.* at 156,066. It did not decide other alleged grounds for non-enforcement of Modification 25, including "lack of consideration, duress, unconscionability or fraud." *Id.*

Also contrary to its earlier, vacated finding, the Board held that the release in Modification 29 could not be enforced because it had been obtained by duress. *Id.* at 156,067. The elements of duress, the Board held, were:

> (1) [O]ne party involuntarily accepted the terms of another; (2) the circumstances permitted no other alternative; (3) such circumstances were the result of coercive acts of the other party.

Id. The coercive act, the Board held, was the government's withholding of the progress payment. The contract "gave the contracting officer no right to withhold an approved progress payment until the contractor signed a contract modification," the Board explained. *Id.* The Board found that the government's conduct "was the predominant, if not sole, cause of" the contractor's performance problems, and hence its financial distress. *Id.* at 156,060. Since the government "was well aware of the contractor's financial distress," the

Board concluded, its "delaying of payment ... coerced [the contractor] to sign [Modification 29]." *Id.* at 156,067.

The Board held, however, that the contractor could recover only under the standard "Government Delay of Work" clause, which provided equitable adjustment for government delay, including a delay "by an act of the Contracting Officer in the administration of this contract, which act is not expressly or impliedly authorized by this contract," *i.e.*, a breach. 33 C.F.R. § 7- 104.77(f) (1984). The Board held that the contractor could not recover for breach of contract, because the government's breaches all constituted government delay. "A contractor cannot maintain a breach claim for Government delay when relief is available under the contract," the Board explained. *Id.* at 156,067.

The contractor moved for reconsideration on October 11, 2001, arguing, among other things, that the government delays constituted a constructive change of the method of performance of the contract; that the government's conduct resulted in a cardinal change; and that the contractor was entitled to damages for contracts later awarded to other contractors. On December 7, 2001, the Board denied the motion. *Freedom NY, Inc.*, 02-1 B.C.A. (CCH) ¶ 31,676 at 156,538, 2001 WL 1598349 (2001). With respect to the first argument, the Board held that the "Delay of Work" clause precluded recovery for constructive change under the "Changes" clause (which allowed recovery of lost profits) based on government delay. *Id.* at 156,539. With respect to the cardinal change, the Board held that the facts previously found by the Board, which the contractor did not dispute, "d[id] not establish that appellant performed duties 'materially different from those originally bargained for' and 'beyond the scope of the contract.' " *Id.* at 156,540 (quoting *Air-A-Plane Corp. v. United States*, 187 Ct.Cl. 269, 408 F.2d

1030, 1033 (1969) and *Allied Materials & Equip. Co. v. United States,* 215 Ct.Cl. 406, 569 F.2d 562, 563-64 (1978)). It therefore concluded that there was no cardinal change. *Id.* With respect to the third argument, the Board held that damages for failure to obtain future contracts were too speculative because the terms of the contract "expressly did not require the Government to award any contract to the appellant [as an approved MRE producer]." *Id.*

The government timely appealed. The contractor cross appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(b).

DISCUSSION

We review the Board's decision under the following standard:

> [T]he decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

41 U.S.C. § 609(b) (2000). The substantial evidence standard requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *AT&T Communications, Inc. v. Perry,* 296 F.3d 1307, 1311 (Fed.Cir.2002) (quoting *Consol. Edison. Co. v. Nat'l Labor Relations Bd.,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). We review the Board's legal

conclusions without deference. *Rex Sys., Inc. v. Cohen,* 224 F.3d 1367, 1371 (Fed.Cir.2000).

I

The government's primary contention on appeal is that the Board erred in its conclusion that Modifications 25 and 29 did not release the government from liability.

In the course of performance of a government contract, disputes arise between the contractor and the government with some frequency. Federal policy favors settlement of disputes before they develop into litigation. "The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim." 48 C.F.R. § 33.204 (2002). The prompt settlement of those disputes serves the interests of the contractor, the government, and the public at large. In post-contract litigation, the Board and the courts should be reluctant to invalidate such settlements absent a clear showing of invalidity. " '[T]hose who employ the judicial appellate process to attack a settlement through which controversy has been sent to rest bear a properly heavy burden' of proof that the agreement was improperly obtained." *Tiburzi v. Dep't of Justice,* 269 F.3d 1346, 1355 (Fed.Cir.2001) (quoting *Asberry v. United States Postal Serv.,* 692 F.2d 1378, 1380 (Fed.Cir.1982)).

Here we conclude that the Board erred in invalidating Modification 25 on the ground that the government had breached an alleged side agreement, but that the Board correctly concluded that Modification 29 was invalid due to duress.

A. Modification 25

The parol evidence rule provides that when a document is integrated, "barring certain limited exceptions (e.g., fraud), a party to a written contract cannot supplement or interpret that agreement with oral or parol statements that conflict with, supplant, or controvert the language of the written agreement itself." *Schism v. United States,* 316 F.3d 1259, 1278 (Fed.Cir.2002) (en banc). The rule is so well established that "no citation is necessary to support [it]." *Id.* As Williston explains, the rule "seeks to achieve the related goals of insuring that the contracting parties, whether as the result of miscommunication, poor memory, fraud, or perjury, will not vary the terms of written undertakings." Samuel Williston, *Williston on Contracts* § 33:1 (4th ed. 1999).

To be sure, if two separate agreements are negotiated at the same time, both of which meet applicable contract requirements, including consideration, both may be enforceable. *See, e.g.* John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 3.2(a) (4th ed. 1998); *Brennan v. Carvel Corp.,* 929 F.2d 801, 806-07 (1st Cir.1991).[1] But that is not the situation here. It is admitted that the alleged side agreement cannot stand alone since the only consideration for the side agreement coming from the contractor was the execution of Modification 25 itself. We must therefore determine whether Modification 25 is completely integrated.

When a document is completely integrated, no additional terms may be added, whether consistent or

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[1] So too after an agreement is executed, it may be modified by a later agreement that satisfies the law of contracts and applicable government requirements. Arthur L. Corbin, *Corbin On Contracts,* § 574 (Interim ed. 2002).

inconsistent, through parol evidence. *McAbee Constr., Inc. v. United States,* 97 F.3d 1431, 1434 (Fed.Cir.1996) *See also* Restatement (Second) of Contracts § 216(1); Uniform Commercial Code § 2- 202. Whether a contract is integrated is a question of law. *Sylvania Elec. Prods., Inc. v. United States,* 198 Ct.Cl. 106, 458 F.2d 994, 1006 n. 9 (1972). We therefore review the finding of the Board without deference. *Id.*

We have recognized the importance of integration clauses in determining whether a contract is completely integrated. In *McAbee,* we emphasized that, although they are not dispositive, integration clauses create a "strong presumption that a contract [is], as it purport[s] to be, a fully-integrated agreement." 97 F.3d at 1434. One attempting to add terms to a contract with an integration clause "carries an extremely heavy burden in overcoming this attestation to the document's finality and completeness." *Id. See also Campbell v. United States,* 228 Ct.Cl. 661, 661 F.2d 209, 218 (1981) (Where a contract includes an integration clause, "it is a fair bet that the parties agreed to no more than they said.").

Where, as here, the parties are both commercial entities or the government, integration clauses are given particularly great weight. As the Second Circuit has stated, "the presumption of completeness is particularly strong where sophisticated parties have conducted extensive negotiations prior to entering into the agreement." *Telecom Int'l Am., Ltd. v. AT & T Corp.,* 280 F.3d 175, 191 (2d Cir.2001). *See also Binks Mfg. Co. v. Nat'l Presto Industries, Inc.,* 709 F.2d 1109, 1116 (7th Cir.1982).

Here we conclude that, in light of the integration clause in the contract, the Board erred in invalidating Modification 25 on the ground that the government breached

an alleged side agreement. Although our cases recognize that extrinsic evidence may be considered on the issue of integration,[2] we think that such circumstances are extremely limited where there is an integration clause. *See McAbee,* 97 F.3d at 1434. Like "most courts" we elect to follow the "traditional rule" set forth in the third edition of the Williston treatise (described in Calamari & Perillo, *supra,* § 3.6), namely that an integration clause "conclusively establishes that the integration is total unless (a) the document is obviously incomplete or (b) the merger clause was included as a result of fraud or mistake or any other reason to set aside the contract." Calamari & Perillo, *supra,* § 3.4(c) (citing Samuel Williston, *Williston on Contracts,* § 633 (3d ed. 1957)).[3]

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[2] Where there is no integration clause, greater attention may be paid to the surrounding circumstances. As *McAbee* recognized, "extrinsic evidence is 'especially pertinent in instances where ... the writing itself contains no recitals or other evidence testifying to its intended completeness and finality.' " *Id.* (quoting *David Nassif Assoc. Inc. v. United States,* 214 Ct.Cl. 407, 557 F.2d 249, 256 (1977) (*Nassif I*)). *See also Nassif I,* 557 F.2d at 256 ("[I]t is not the writing alone which attests to its own finality and completeness but the circumstances surrounding its execution including the negotiations which proceeded it;" the contract "contain[ed] no recitals or other evidence testifying to its intended completeness and finality."); *Sylvania,* 458 F.2d at 1006, 1005-08 ("Parol or extrinsic evidence must be admissible on the issue of the extent to which a written agreement is integrated, for as has been said, the writing cannot prove its own integration;" the opinion makes no mention of an integration clause).

[3] The Fourth Edition of the Williston treatise continues to recognize that "[p]erhaps most courts ... give presumptive effect to a merger clause," but also recognizes the existence

There are no such circumstances present here. Indeed, in this case, as in *McAbee,* the circumstances surrounding the negotiation of Modification 25 support a finding of complete integration. Here, as in *McAbee,* 97 F.3d at 1434, the parties expressly discussed a possible side agreement, and the contractor (in letters dated May 13, 1986 and May 28, 1986, both sent before the execution of Modification 25) specifically requested that the alleged side agreement be memorialized (stating in its letters during the contract negotiations that the "settlement is reflected *in part* in the Contract Modification" and requesting that the side agreement "be confirmed as soon as practical."). (J.A. 298, 300, 301, 303) (emphasis added). But Modification 25 as executed contained no reference to any side agreement and contained an explicit integration clause. Under such circumstances we held in *McAbee* that there was no basis for

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of a "minority view" that "parol evidence can ... be examined to determine whether the contract is integrated, and to explain what the words used in the contract mean." Williston, *supra,* § 33:16. Of course, any ambiguities in an integration clause can be resolved by considering the surrounding circumstances. *United States v. Winstar Corp.,* 518 U.S. 839, 863, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). The Restatement also recognizes that the existence of an integration clause is "likely to conclude the issue whether the agreement is completely integrated." *Restatement (Second) of Contracts,* § 216 cmt. e (1981); *see also* Calamari & Perillo, *supra,* § 3.6 (The rule "followed by most courts, is that a merger clause will ordinarily resolve the issue of total integration."); James J. White & Robert S. Summers, *Uniform Commercial Code* § 2-12 (4th Ed. 2000) (A merger clause "should be effective to preclude a judge from admitting extrinsic evidence on a theory that the writing is not a complete and exclusive statement of the contract terms.").

ignoring the integration clause. 97 F.3d at 1434. Here, as in *McAbee,* the contractor "should have requested that the integration clause be stricken or modified if the agreement did not expressly address all of the issues on which the parties had agreed." *Id.*

We conclude that Modification 25 was an integrated document to which no additional terms could be added through parol evidence, and that it did not contain the unilateral promises allegedly made by the government. Accordingly, we reverse the Board's decision invalidating Modification 25 on the ground that the government breached the alleged side agreement, and remand for consideration of the contractor's other alleged grounds for invalidation of Modification 25.

B. Modification 29

We reach a different result concerning the validity of Modification 29. We affirm the finding of duress.

To render a contract unenforceable for duress, the party "must establish that (1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts." *Dureiko v. United States,* 209 F.3d 1345, 1358 (Fed.Cir.2000); *see also, e.g., United States v. Bethlehem Steel Corp.,* 315 U.S. 289, 301, 62 S.Ct. 581, 86 L.Ed. 855 (1942); *Liebherr Crane Corp. v. United States,* 810 F.2d 1153, 1158 (Fed.Cir.1987); *Sys. Tech. Assoc., Inc. v. United States,* 699 F.2d 1383, 1387 (Fed.Cir.1983).

In addressing the first two parts of this test, we have held that government coercion must have been the cause of

the contractor's agreement.[4] Here, however, the government does not dispute that its withholding of progress payments caused the contractor to agree to Modification 29. The sole question, then, is whether the government's action was coercive.

Our past decisions make clear in the procurement context proof of coercion requires proof of wrongful action by the government. For example, in *Johnson, Drake & Piper, Inc. v. United States,* our predecessor court emphasized that "[e]conomic pressure and even the threat of considerable financial loss are not duress." 209 Ct.Cl. 313, 531 F.2d 1037, 1042 (1976) (internal citation omitted). Rather, for a government action to be coercive, "[s]ome wrongful conduct must be shown." *Id.* at 1043. In other words, "[t]o render an agreement voidable on the grounds of duress it must be shown that the party's manifestation of assent was induced by an improper threat which left the recipient with no reasonable alternative save to agree." *David Nassif Assoc. v. United States,* 226 Ct.Cl. 372, 644 F.2d 4, 12 (1981) (internal citation omitted) (*Nassif II*).

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[4] In *Systems Technology*, we declined to find that delay in making an audit available by the government for five to six weeks amounted to coercion when there was no proof that the delay caused the contractor's financial distress. 699 F.2d at 1388-89. In *Liebherr Crane Corp.*, applying the rule from *Systems Technology,* we held that the Board of Contract Appeals' finding that there was no duress was supported by substantial evidence when there was "no indication that [the contractor's] acceptance" was "involuntary," and its "predicament resulted from its own initial gross negligence." 810 F.2d at 1158. In *Dureiko,* we similarly found no duress where the contractor was in financial distress not because of action by the government but because of losses caused by a hurricane. 209 F.3d at 1358.

Illegal action by the government (that is, action in violation of a statute or regulation) can support a finding of duress. *Liebherr,* 810 F.2d at 1158; *Sys. Tech.,* 699 F.2d at 1387-88; *Nassif II,* 644 F.2d at 12; *Johnson, Drake & Piper,* 531 F.2d at 1042-43. However, an act can be coercive without being illegal. Government coercion may be supported by a finding that the government engaged in wrongful acts by violating the contract without a good-faith belief that its actions were justified or by violating the covenant of good faith and fair dealing implicit in every contract. In *Systems Technology,* this court observed that our precedent

> ha[s] done away with the requirement of an illegal act ... An act the government is empowered to take under law, regulation, or contract may nonetheless support a claim of duress if the act violates notions of fair dealing by virtue of its coercive effect.

699 F.2d at 1387-88. In summary, coercion requires a showing that the government's action was wrongful--*i.e.* that it was (1) illegal, (2) a breach of an express provision of the contract without a good-faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing. *Sys. Tech.,* 699 F.2d at 1387-88; *Nassif II,* 644 F.2d at 12; *Johnson, Drake & Piper,* 531 F.2d at 1042-43.

Here the contractor has shown the existence of a wrongful act. It is admitted that the contractor was in deep financial distress at the time Modification 29 was signed. The administrative contracting officer approved the progress payment based on the factors that the contract required be considered: "the best interest of the Gov't., the contract loss ... progress payments and cases accepted to date ... disallowances and Modification [29]." Nevertheless, the

government withheld the progress payment, for the sole purpose of pressuring the contractor into signing Modification 29. The contract provided for the withholding of progress payments if the contractor

> (i) has failed to comply with any material requirement of this contract, (ii) has failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of the contract, (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, (iv) is delinquent in payment of the costs of performance of this contract in the ordinary course of business, (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this contract, or (vi) is realizing less profit than the estimated profit used for establishing a liquidation percentage in paragraph (b), if that liquidation percentage is less than the percentage stated in paragraph (a)(1).

The contract also allowed the government to withhold progress payments "during the time the contractor's accounting systems and controls are determined by the Government to be inadequate for segregation and accumulation of contract costs." The contract did not allow the government to withhold progress payments simply to pressure the contractor into giving up its rights under the contract. The government could not have had a good-faith belief that withholding for this purpose was permissible under the contract.

The government argues that the withholding of the progress payments was permissible because the contractor was in default or because the government in good faith believed that the contractor was in default. It is true that a good-faith withholding of the progress payment because the government believed the contractor's performance was deficient would not constitute duress. "[T]he assertion of a legitimate contract right cannot be considered as violative of a duty of good faith and fair dealing," and thus cannot be coercive. *Nassaf II,* 644 F.2d at 12. For example, in *Johnson, Drake & Piper,* "it [was] not duress to threaten to make good faith use of the remedies prescribed under a contract." 531 F.2d at 1043. The contracting officer simply told the contractor, in good faith, that termination was warranted and explained that the contractor's excuses were unavailing. The contractor ultimately agreed to a modification, and we upheld the Board's finding that the modification was not obtained by duress. *Id. See also Nassif II,* 644 F.2d at 12 (Board finding of lack of duress upheld when the government threatened non- performance "in the face of what it saw (and correctly so) as a repudiation by the [contractor] of a material part of the parties' bargain.").

But the wrongfulness of the government's action must be judged at the time it was taken. *Pigeon v. United States,* 27 Ct.Cl. 167, 175 (1892). Here, the Board found that the government withheld the progress payment not for a permissible reason, but simply to pressure the contractor into signing the modification. This finding is supported by substantial evidence. *See Freedom NY,* 01-2 B.C.A. (CCH) at 156,057. Whether styled as an unjustifiable breach of the contract's express terms or as a breach of the duty of good faith and fair dealing, the government's action was improper. The government cannot defeat a duress claim by an after-the-fact justification for an action that was taken for an improper purpose.

III

The government's final basis for appeal, that the Board's decision was arbitrary and capricious because it conflicted with an earlier decision of the Board, is frivolous. The portion of the earlier decision relied on by the government was vacated by the Board because the contractor had not expected the issue of breach to be decided at that stage of the proceedings. *Freedom NY,* 96-2 B.C.A. (CCH) at 142,325. The government has not appealed the order vacating that portion of the earlier decision. Although it is true that the Board did not do a perfect job removing every fact on which the vacated part of the decision was based, its intent was unmistakable:

> We delete reference to docket number ASBCA No. 43965 from the caption of our 7 May 1996 opinion and in the "DECISION" section thereof; we vacate that portion of the decision denying ASBCA No. 43965; and we restore the appeal in ASBCA No. 43965 to our active docket.

Id. Given this intent, the Board's incomplete removal of the facts on which the vacated decision was based is irrelevant. The law of the case thus does not apply because "a vacated judgment 'has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case.' " *U.S. Philips Corp. v. Sears Roebuck & Co.,* 55 F.3d 592, 598 (Fed.Cir.1995) (quoting *No E.-W. Highway Comm., Inc. v. Chandler,* 767 F.2d 21, 24 (1st Cir.1985)). Unlike a situation in which findings conflict within a single decision, *see Essex Electro. Eng'rs, Inc. v. Danzig,* 224 F.3d 1283, 1295 (Fed.Cir.2000), the Board was free to come to different factual conclusions the second time around without revisiting its decision in the earlier vacated decision.

IV

In its cross appeal, the contractor argues that the breaches by the government were so extensive as to constitute a cardinal change. A cardinal change "occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." *Krygoski Constr. Co. v. United States,* 94 F.3d 1537, 1543 (Fed.Cir.1996) (citations omitted); *AT&T Communications, Inc. v. Wiltel, Inc.,* 1 F.3d 1201, 1205 (Fed.Cir.1993); *Allied Materials & Equip. Co. v. United States,* 215 Ct.Cl. 406, 569 F.2d 562, 563-64 (1978). A cardinal change can occur even when there is no change in the final product because "it is the entire undertaking of the contractor, rather than the product, to which we look." *Edward R. Marden Corp. v. United States,* 194 Ct.Cl. 799, 442 F.2d 364, 370 (1971). The finding of a cardinal change is "principally a question of fact." *Allied Materials,* 569 F.2d at 565. The Board specifically found that the facts "d[id] not establish that appellant performed duties materially different from those originally bargained for and beyond the scope of the contract" and thus that there was no cardinal change. *Freedom NY,* 01-2 B.C.A. (CCH) at 156,540. Although the contractor does not contend that the Board erred in finding or declining to find any specific fact, it still takes issue with the Board's determination that there was no cardinal change. That too is a factual inquiry. "Even where underlying facts are established, the drawing of conclusions as to ultimate facts is still a fact-finding function." *Allied Materials,* 569 F.2d at 565.

We conclude that the Board's finding was supported by substantial evidence. The Board found that the government: (1) improperly denied, suspended, and delayed making progress payments, *Freedom NY,* 01-2 B.C.A.

(CCH) at 156,061; (2) improperly interfered with the contractor's ability to obtain financing, *id* at 156,063; (3) diverted menu items, *id.*; (4) delayed delivery of menu items it was contractually obligated to deliver, *id.* at 156,064; (5) imposed improper inspections, *id.*, and (6) imposed improper testing requirements, *id.* It further held that all of these breaches merely constituted governmental delay, which was compensable under the contract. *Id.* at 156,067-68. We agree that the Board could properly find that these breaches did not constitute "an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." *Krygoski Constr.*, 94 F.3d at 1543.

The contractor also argues that the Board should have awarded anticipated profits and fixed overhead associated with future contracts which, it contends, it would have been awarded as an approved MRE-producer absent the government's breach of contract. It relies principally on *Locke v. United States,* 151 Ct.Cl. 262, 283 F.2d 521 (1960). That case, however, differs from this one. The government in *Locke* was obligated to purchase its requirements from the contractors it maintained on its approved list, and the contract itself required that the contractor be on that list. *Id.* at 522. The breach at issue in *Locke* was wrongfully removing the contractor from the approved list, with the result that the contractor was denied future contracts. *Id.* at 523-24. The Court of Claims held that, in such a situation, lost profits were neither remote nor speculative because the government's breach directly resulted in the loss of future contracts. *Id.* at 525. Here, by contrast, the contractor does not assert that the contract entitled it to future contracts;[5]

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[5]We have held that there was no enforceable side agreement in connection with Modification 25 promising future contracts.

rather, it asserts that, absent the damage the government breaches did to its business, it would have been eligible for future contracts. Thus, its claim is not, as in *Locke,* for profits "such as would have accrued out of the contract itself, as direct and immediate results of its fulfillment," but rather for profits "such as would have been realized from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract." *Wells Fargo Bank, N.A. v. United States,* 88 F.3d 1012, 1022-23 (Fed.Cir.1996) (citation omitted); *see also Olin Jones Sand Co. v. United States,* 225 Ct.Cl. 741, 743-44, 1980 WL 13211 (1980) (damages based on future contracts "too remote and speculative to be recoverable" when government wrongdoing caused contractor to lose bonding capacity and thus be unable to obtain contracts); *Rocky Mountain Constr. Co.,* 218 Ct.Cl. 665, 666, 1978 WL 8468 (1978) (damages based on future contracts "too remote, indirect and speculative to permit recovery" when absent government delay contractor would have been able to bid on other contracts). The Board here correctly held that such profits are too "remote and uncertain" to be recoverable.

We have considered the other points argued by the contractor and the government and find them to be without merit.[6]

CONCLUSION

For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with

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[6] In light of our disposition of Modification 25, we do not address the contractor's claim for interest dating from its certified claim of April 24, 1986. We note that it appears in any event that this claim was not properly raised below, and is thus foreclosed.

this opinion.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED.

COSTS

No costs.

APPENDIX B

United States Court of Appeals,
Federal Circuit.

Donald H. RUMSFELD, Secretary of Defense, Appellant,
v.
FREEDOM NY, INC., Appellee.
Freedom NY, Inc., Appellant,
v.
Donald H. Rumsfeld, Secretary of Defense, Appellee.

Nos. 02-1105, 02-1130.

DECIDED: Oct. 10, 2003.

Gilbert J. Ginsburg, of Washington, DC, filed a combined petition for panel rehearing and rehearing en banc for Freedom NY, Inc. Of counsel on the petition were Neil H. Ruttenberg, of Beltsville, MD; and Shlomo D. Katz, Epstein Becker & Green, P.C., of Washington, DC.

William K. Olivier, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, filed a response to the petition for the Secretary of Defense. With him on the response was Peter D. Keisler, Assistant Attorney General; and David M. Cohen, Director.

Before SCHALL, GAJARSA, and DYK, Circuit Judges.

PER CURIAM.

Freedom NY, Inc. ("Freedom") petitions for panel rehearing and rehearing *en banc*. We reaffirm our earlier decision affirming in part, reversing in part, and remanding to the Armed Services Board of Contract Appeals ("Board").

Freedom asserts that rehearing is warranted because we should have ruled that a letter from Freedom to the Defense Logistics Agency ("DLA") was incorporated into Modification 25. Freedom argues that the Board found as a matter of fact that the letter was attached to Modification 25:

> On 29 May 1986, Henry Thomas and consultant Francois met with PCO Bankoff. Mr. Thomas had a 28 May 1986 letter to DLA's R. Chiesa (ex. G-40), conforming in substance to the 2 May 1986 version, *attached to proposed Modification No. P00025* (P00025). Mr. Bankoff saw the 28 May date of that letter, and provided an essentially identical FNY 13 May 1986 letter to Mr. Chiesa, *which Mr. Thomas attached to Modification No. P00025.*

Freedom NY, Inc., ASBCA No. 43965, 01-2 B.C.A. (CCH) ¶ 31,585, at 156,055- 56, 2001 WL 1143312 (2001) (emphases added). Freedom also relies on the following finding of fact by the Board: "Considering the documents in evidence and [the government's witness's] demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony, we attach no probative weight to [the witness's] denial of the 'side agreement' *attached to P00025.*" *Id.* at 156,056 (emphasis added).

As an initial matter, we note that Freedom has waived this argument. Freedom admits that "the parties' original briefs did not fully consider or address the issues raised in Freedom's Petition." "[A]n issue not raised by an appellant in its opening brief ... is waived." *Pandrol USA, LP v. Airboss Ry. Prods.*, 320 F.3d 1354, 1366 n. 3 (Fed.Cir.2003) (quoting *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed.Cir.1990)) (alterations in original).

Even if the argument had not been waived, Freedom would not prevail on the merits. The parties signed Modification 25 on May 29, 1986. At that meeting, the Board found simply that Mr. Thomas, the president of Freedom, had attached the May 13 and May 28 letters (which were substantially identical) describing an alleged side agreement to his copies of Modification 25. One party to a contract cannot bind the other simply by attaching a document to a copy of the contract, even if that particular copy is signed. *Restatement (Second) of Contracts* § 132 cmt. c (1981) ("It is sufficient that ... *the party to be charged* physically attaches one document to the other ...." (emphasis added)); *id.* § 132 cmt. c, illus. 4 ("[T]he fastening [of two sheets by A] is a sufficient adoption of A's signature with reference to both sheets *to charge A,* but only if the evidence of the fastening is clear and convincing." (emphasis added)). Rather, the documents must clearly indicate that the parties intended that they be considered together as a single contract. *Id.* § 132 ("The memorandum may consist of several writings if one of the writings is signed and *the writings in the circumstances clearly indicate that they relate to the same transaction.*" (emphasis added)). In sharp contrast to this requirement, the May 13 and May 28 letters expressly state that they are *not* part of Modification 25:

> During those settlement negotiations between Freedom's representatives and DLA, significant matters were discussed relating to Freedom's participation in the MRE Assembly Program. It was agreed that the understandings reached on those matters were not appropriate for inclusion in the Mod[ification] but were more appropriately to be addressed in a separate letter.

In addition, Modification 25 itself contains an integration clause. Therefore, Modification 25 in this case cannot be read to make the letters a part of the contract. Freedom's other contentions also are without merit.

Accordingly, Freedom's petition for panel rehearing is *denied.*

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en bank and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEROF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 17, 2003.

FOR THE COURT,
/s/
Jan Horbaly
Clerk

Dated: October 10, 2003

APPENDIX C

ARMED SERVICES BOARD
OF CONTRACT APPEALS

Appeal of –

FREEDOM NY, INC.

Under Contract No. DLA13H-85-C-0591

ASBCA No. 43965

APPEARANCES FOR THE APPELLANT:
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APPEARANCE FOR THE GOVERNMENT:
Kathleen D. Hallam, Esq.
Chief Trial Attorney
Defense Supply Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE JAMES

The captioned contract was terminated for default in 1987. In 1991, appellant submitted a $21,959,311 claim, alleging Government breaches and constructive changes under the contract. Appellant appealed from that claim's denial, which we docketed as ASBCA No. 43965. In May

1996, the default termination was converted to a termination for convenience of the Government. Freedom NY, Inc., ASBCA No. 35671, 96-2 BCA ¶ 28,328. In August 1996, the Board vacated the part of its May 1996 decision that had denied appellant's breach claim, and reinstated appeal No. 43965. Freedom NY, Inc., ASBCA No. 35671, 96-2 BCA ¶ 28,502 at 142,325. The parties stipulated certain facts, and an 11-day hearing was held at Brooklyn and at the Board's offices. Subsequently, in December 2000, the parties settled the amount due for the termination for convenience subject to any adjustment to the contract price resulting from this appeal. The parties submitted post-hearing briefs with copies of the settlement Modification No. A00004, which we receive in evidence as Board Exhibit 1. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. We are to decide both liability and damages (tr. 8).

FINDINGS OF FACT

1. The Meal, Ready-to-Eat (MRE) combat ration is a "mobilization essential item" approved under the Industrial Preparedness Program (IPP) and procurable by negotiation. MRE contract negotiations were limited to "planned producers" with whom the Defense Personnel Support Center (DPSC) of the Defense Logistics Agency (DLA) had entered into industrial preparedness agreements. The IPP's objective was to maintain viable producers capable of increasing their peacetime production to satisfy national mobilization needs in the event of mobilization. MRE producers had no non-MRE business. (Stip., ¶ 1; exs. FT001, FT004, FT019;[7] tr. 49-51, 83-84, 252-53)

2. From 1979 to early 1984, DPSC made four MRE

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7 Appellant's exhibits all have the prefix "FT."

procurements, designated "MRE- 1," "MRE-2," "MRE-3" and MRE-4." Those procurements included "retort" contracts for sterilized entrees and components sealed in a pouch, and "assembly" contracts for sealing retorts and other components in an MRE container, and packing several MREs in a sturdy, air-droppable case (tr. 43-44).

3. Respondent authorized contract awards to Right Away Food Corp. (RAFCO) and Southern Packaging & Storage Co. (SOPACKO) for MRE-2 and for MRE-3 (exs. FT004, FT011). Freedom Industries, Inc. (FII), appellant's predecessor, submitted an offer on MRE-3, but did not receive a contract. FII was approved as an IPP planned producer on 30 March 1983, after the MRE-3 awards. (Stip., ¶¶ 2, 4; ex. FT014) FII's 13 February 1984 IPP "Production Planning Schedule" was limited to fiscal years 1984- 1985, and stated that DPSC/DLA intended to negotiate MRE component contracts with FII, with the caveat--

> [T]he signatures hereon in no way bind the named firm(s) nor the Government in any contractual relationship, nor is acceptance to be construed as an agreement by industry to maintain production capability as indicated herein. The signature of industry does not obligate the named firm to accept a military contract if one is offered nor is the Government obligated to convert production planning schedules to contracts, to contract with the named firm if procurement of the items specified herein is required . . . .

(Ex. FT036 at 7)

4. Respondent authorized MRE-4 contract awards to "at least two" of three planned producers, SOPACKO,

RAFCO and FII (ex. FT018). FII submitted an offer on MRE-4. DPSC awarded MRE-4 contracts only to SOPACKO and RAFCO. (Stip., ¶ ¶ 2, 5; ex. FT024A at 237)

5. Respondent authorized MRE-5 contract awards to RAFCO, SOPAKCO, and FII (stip., ¶ 2; ex. FT029). On 15 February 1984, DPSC issued request for proposals (RFP) DLA13H-84-R-8257 for the MRE-5 procurement of 3,099,520 cases in 1985. The RFP requested offers from the three MRE planned producers, and anticipated three fixed-price contracts for 45 percent, 35 percent, and 20 percent of the total requirement. (Ex. FT030A)

6. The RFP required contractors to process, assemble and package MREs in cases containing 12 separate menu bags, each containing a meat entree, crackers and an accessory packet. The Government was required to provide all crackers, various accessory components and eight meat entrees (beef slices, diced turkey, diced beef, ham slices, chicken a la king, frankfurters, beef slices and ground beef) as Government-furnished materials (GFM). The contractor was required to provide five meat entrees (ham and chicken loaf, meatballs, beef patties, pork patties and chicken loaf) as contractor-furnished material (CFM). (Ex. FT030A at 7-8, 12, 57, 59 of 96; tr. 41-42) Army Veterinary Inspectors (AVI) were designated to inspect and accept MREs at FII's facility (SR4, tab 10 at 4).

7. The RFP incorporated by reference the Defense Acquisition Regulations (DAR) 7-103.21(b) TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (1974 OCT); 7- 104.24(a), GOVERNMENT PROPERTY (FIXED PRICE) (1968 SEP); and 7-104.35(b) PROGRESS PAYMENT FOR SMALL BUSINESS CONCERNS (1982 SEP) clauses, the last of

which provided for monthly progress payments of 95% of the contractor's total, reasonable, allocable costs incurred under the contract, plus 100% of progress payments to subcontractors; disallowed costs ordinarily capitalized and subject to depreciation, except for the properly depreciated portion thereof; set no time by which to pay progress payments; set a 95% progress payment liquidation rate; and, in ¶ (c), authorized the contracting officer to reduce or suspend progress payments or to liquidate them at a rate higher than the 95% specified in ¶ (b) of the clause --

> whenever he finds upon substantial evidence that the Contractor (i) has failed to comply with any material requirement of this contract, (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, (iv) is delinquent in payment of the costs of performance of this contract in the ordinary course of business, (v) has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the undelivered portion of this contract, or (vi) is realizing less profit than the estimated profit used for establishing a liquidation percentage in paragraph (b), if that liquidation percentage is less than the percentage stated in paragraph (a)(1).

The RFP also incorporated the DAR 7-2003.64 PROGRESS PAYMENTS (1974 APR) clause, which stated in pertinent part:

> The appropriate "Progress Payment" clause . .

> . included in the contract . . . shall be inoperative during the time the contractor's accounting systems and controls are determined by the Government to be inadequate for segregation and accumulation of contract costs.

The RFP also included the DAR 7-104.77(f) GOVERNMENT DELAY OF WORK (1968 SEP) clause that provided in pertinent part:

> (a) If the performance of all or any part of the work is delayed or interrupted by an act of the Contracting Officer in the administration of this contract, which act is not expressly or impliedly authorized by this contract, or by his failure to act within the time specified in this contract (or within a reasonable time if no time is specified), an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by such delay or interruption and the contract modified in writing accordingly. . . . However, no adjustment shall be made under this clause for any delay or interruption . . . (ii) for which an adjustment is provided or excluded under any other provision of this contract.

and General Provision No. 2 "CHANGES" (SR4, tab 2 at 98, tab 3 at 2; ex. FT030A at 81 of 96).

8. RFP § H-5, Government Furnished Property, identified 31 GFM items to be furnished in increments from November 1984 through August 1985, and stated:

> h. The Government reserves the right to substitute any of the above named components, and the contractor shall not be entitled to any additional compensation so long as the substituted items are of substantially the same size as the components for which they are substituted. Procuring Contracting Officer shall be notified no less than 5 days in advance of any component shortage. If contractor fails to provide this notice, and assembly is delayed, resulting assembly delay damages shall not be assessable against the Government.
>
> . . . .
>
> j. . . . [T]he Government will not be liable for assembly delays caused by delinquent [GFM] components if the components are delivered by the first day of the corresponding final delivery assembly period.
>
> The assembly contractor shall immediately notify the [PCO] of the failure of any components to be delivered in accordance with the above schedule.

(Ex. FT030A at 57-60 of 96)

9. RFP § L-4, Approval of First Articles and Progress Payments, established the following ceiling on progress payments after first article acceptance at:

> a maximum of 50% of the total item or subcontract dollar value whichever applies. Requests for increases beyond the 50% ceiling

> rate must be accompanied by a cash flow analysis detailing the necessity of the increase by showing the impact of progress payments on operations over and above the impact on profit. No . . . increases in the progress payment rate will be allowed unless written approval is received from the PCO. In addition, a total progress payment ceiling for the entire contract is established at $9,000,000 or 50% of the contract value whichever is lesser. . . . The progress payments shall be for only those costs that are . . . reasonable, allowable [sic] to the contract, and consultant [sic] with sound and generally accepted accounting principles and practices.

RFP § L08(b) required the contractor to establish a manual or mechanized system to assure control and accounting of all GFM and CFM components. RFP § L- 9 required proposals to include monthly cash flow and projected income statements for the entire project, and cost or pricing data for material, labor, overhead and general and administrative (G&A) costs. (Ex. FT030A at 66, 70, 74, 76 of 96)

10. The June 1984 pre-award financial capability survey noted that FII had not performed any major work since January 1984 and that its bank, Dollar Dry Dock Savings Bank (DDD), had withdrawn FII's credit line "because of Freedom Industries' inability to obtain Government contracts." Since the Defense Contract Administration Services Management Area, New York (DCASMA-NY) was reluctant to recommend awarding a contract to a company without adequate financing, the financial survey noted a "Catch-22" situation, which might be alleviated by having DDD send a "pro-forma" letter giving a commitment conditioned on an award to FII. (Stip.,

¶ 14; ex. G-5)

11. Best and final offers (BAFO) were invited by 2 August 1984. Awards were made to RAFCO and SOPAKCO. (Stip., ¶ 16)

12. FII's 2 August 1984 BAFO offered: (a) $34.81 per case for 620,304 cases at a total price of $21,593,000 (apparently rounded), over a 24-month period; (b) award under the Small Business Administration's 8(a) program, in which FII had been approved on 24 February 1984; and (c) payment of its start-up costs for quality control equipment, building repairs, automated building management and control system, and lockers. FII's offer appended 31 July 1984 spread sheets showing: (i) progress payments up to $9,000,000, liquidated at 95%, including progress payments on overhead and G&A costs incurred two months before material and other direct costs, and four months before direct labor costs, would be incurred, and (ii) outside financing of $2,000,000 for production equipment and $5,874,210 for working capital (exs. FT031, FT047A at 00646).

13. DDD's 9 and 10 August 1984 letters to DPSC's contracting officer (PCO) stated that in the event FII assigned a contract pursuant to the RFP in the amount of $21,593,000 to DDD, then DDD would extend FII credit not to exceed $7,244,000 to perform such contract (SR4, tabs 5, 6; ex. FT047A at 00645; tr. 309, 785-90, 959-61, 979). By 13 September 1984, DDD had provided no financing to FII (SR4, tab 8).

14. On 12 September 1984, landlord Richard Penzer leased his Bronxdale Avenue, NY, premises to H.T. Food Products, Inc. (H.T. Food, owned by Henry Thomas), with the right to sublease to FII. From 15 November 1984 to 14

November 1985, the rental was $89,500 plus a tax escrow each month. (Ex. FT052 at 6-7, 42, 45)

15. On 16 October 1984, FII submitted to DPSC a Contract Pricing Proposal for a revised $30.12 unit price (and $18,683,556 total contract price) with spread sheets showing: (a) receipt of 95% progress payments up to $9,000,000, including the costs of machinery, equipment and other tangible fixed assets, liquidated at 84.9%, including overhead and G&A costs incurred four months before material and other direct costs, and seven months before direct labor costs, would be incurred, and (b) $4,061,904 to finance working capital (ex. FT060A at 00812, -820, -823). On about 19 October 1984, FII submitted the Bronxdale facility lease and sublease to respondent (ex. FT057).

16. On 5 November 1984, DPSC, DCASMA-NY, including ACO Marvin Liebman, and Defense Contract Audit Agency (DCAA) reviewed FII's 16 October 1984 cost proposal and 30 October 1984 $29.90 unit price, questioned some costs, and devised a Government negotiation range (ex. FT060E at 00839-60; SR4, tab 9 at 3-4).

17. On 6 November 1984, DPSC and FII concluded negotiations covering all elements of the contract price and agreed to a unit price of $27.725. On that day, FII's President, Henry Thomas, and PCO Thomas Barkewitz signed a Memorandum of Understanding (MOU) with the following "break-out of cost elements" included in the $17,197,928 total negotiated price:

Materials	$ 8,193,637
Direct Labor	811,002
Manuf. O/H	3,627,530
Depreciation	333,333

Other Costs	163,816
G&A	1,840,824
Total Costs	14,970,142
Profit 14.997% [sic, actually 14.88%]	2,227,786
TOTAL PRICE	$17,197,928

(Stip., ¶ 21; AR4, tab F17; SR4, tab 9 at 4-6; tr. 130- 32)

18. In the MOU, FII's negotiated manufacturing overhead costs included operating expenses of a capital nature for quality control and maintenance equipment, building repairs, an automated building management and control system, and lockers, totaling $522,218. The $333,333 depreciation cost was based on FII's proposed $1.5 million for capital equipment. (Stip., ¶ 21; SR4, tabs 9, 75 at 7; tr. 192-93, 347-48) The parties agreed that since FII only had one contract, all contract costs would be treated as direct costs (tr. 135-37, 139-40, 190, 387-88), as DPSC had agreed with MRE-1 contractors (ex. FT010 at 73-74; tr. 58-61).

19. At the parties' contract negotiation on 6 November 1984, FII's Chief Financial Officer Patrick Marra prepared spreadsheets to back up the MOU costs, and provided a copy of them to the PCO on 6 November 1984, and to ACO Liebman on 13 December 1984 for guidance in progress payments. FII's spreadsheets showed: (a) $13,326,175 in progress payments at "95%" liquidated at 82.6%, and beginning in December 1984 with 18 cost items otherwise classified as "indirect costs" to be incurred two months before incurring material costs, four months before incurring other direct costs, and six months before incurring direct labor costs; and (b) outside financing of $1,500,000 for capital equipment and $1,798,936 for "working capital." (Exs. FT062 at 00908- 20, FT064, FT072; tr. 133-35, 187-89, 300-01, 341-43)

20. The parties agreed on $811,002 in direct labor costs based on FII's proposed 144 persons using state-of-the-art, automated equipment to assemble MREs and to track GFM and CFM, namely, Koch Multi-Vac vacuum equipment for bagging crackers and accessories more reliably so as to avoid retort sealing problems experienced by prior contractors, Doboy continuous band sealers and double belt conveyors for MRE main assembly, and International Paper V-2 case- forming and sealing equipment (SR4, tab 9 at 7; ex. FT022 at 00193; tr. 327-29, 516-19).

21. FII's 8 November 1984 letter notified DDD of successful completion of MRE- 5 contract negotiations, enclosed the MOU and final cash flow spread sheets, and requested DDD's finalizing of working capital and equipment financing, about 5% of the contract costs (ex. FT064).

22. On 15 November 1984, the PCO awarded the MRE-5 captioned contract to FII to supply 620,304 cases of MRE at $27.725 per case, for a total firm fixed- price of $17,197,928. Pursuant to Box 18 of the Standard Form 26 Award/Contract, the contract consisted of the RFP, FII's offer and the Award/Contract. We find that FII's final offer included the spreadsheets backing up the 6 November 1984 MOU. Delivery was to be made in six monthly installments between 2 July and 31 December 1985. Inspection and acceptance were to be made at the contractor's plant. The contract also modified the § L-4 progress payments ceiling (finding 9) as follows:

> [T]he limitation of Progress Payments shall increase by $2,000,000 after the first delivery increment (100,000 cases) has been completed. This limitation shall increase by another $2,000,000 after the second delivery

increment (100,000 cases) has been completed.

(Stip., ¶ ¶ 25, 26; SR4, tab 10)

23. At the time of contract award, ACO Liebman knew that the MRE-5 contract was FII's only Government contract; FII anticipated progress payment financing of 95% of costs; all costs were to be treated as direct costs, including the start-up operating expenses of a capital nature in G&A and overhead; DCAA had found that FII's accounting system was adequate for all purposes, including progress payment purposes; and FII had a negative net worth and owed prior creditors about $2.6 million dollars (ex. FT050; tr. 1516, 1621, 1623-27, 1644- 45).

24. On 16 November 1984, FII hand delivered Progress Payment Request (PPR) No. 1 to ACO Liebman, requesting payment of $89,500 for rent and $16,089 for taxes, 95% of which total was $100,310 (ex. FT422), together with a copy of the recently awarded contract. ACO Liebman refused to process PPR No. 1 until he received the contract through "official channels." (Tr. 369- 70) At that time the DAR regulations provided in pertinent part:

> **E-506** . . . If the contractor's accounting system and controls have been found [by DCAA] to be sufficient and reliable for segregation and accumulation of contract costs, no further examination should be necessary [for progress payments] so long as the efficiency and reliability of the contractor's system and controls are maintained.
>
> . . . .

> **E-520** . . . Preaudit, that is, audit before the making of progress payments will be limited to those situations in which there is reason to question the reliability or accuracy of the contractor's [progress payment] certificate, or reason to believe that the contract will involve a loss. Where the adequacy and reliability of the contractor's accounting system and controls have been established in accordance with E-506, there shall be no requirement for preaudit of the first progress billing under new contracts.

(Ex. G-1) ACO Liebman acknowledged receipt of PPR No. 1 on 29 November 1984 (AR4, tab F20), but held payment in abeyance pending audit.

25. On 28 November 1984, Richard Penzer notified H. T. Food that their 12 September 1984 lease was canceled for non- payment of the first month's rent on 15 November 1984, but he would reinstate the lease if H. T. Food paid the rent (ex. G-12). According to Henry Thomas' 11 July 1985 affidavit, he and Richard Penzer orally agreed to restrict H. T. Food's use of the premises to 800 square feet, and H. T. Food would be liable for the $89,500 rent only when it began to occupy the entire 400,000 square foot premises (ex. G-18 at 26). We do not find Mr. Thomas' statement as a fact, because Mr. Penzer's testimony did not confirm such oral agreement, and such agreement conflicts with respondent's January- March 1985 plant visit reports, in which respondent noted several inspection tours around FII's plant, inside and exterior, with no mention of any restriction of FII's use to a 800 square foot area, and its April 1985 report, which does not mention any expansion of FII's use from 800 to 400,000 square feet (SR4, tab 193).

26. The 7 December 1984 DCAA audit memorandum to ACO Liebman stated that PPR No. 1 was "returned since the requested amount is not supported by fair value of any work accomplished under the contract." (SR4, tab F21) Although ACO Liebman knew that progress payments to small business firms did not require physical work progress (tr. 1778), on 10 December 1984 he requested a legal opinion on whether PPR No. 1 was payable without physical progress (SR4, tabs F22, F25).

27. On 7 December 1984, FII resubmitted PPR No. 1 requesting $252,150, including $211,178 for two months' rent and taxes (SR4, tab 21 at 12; tr. 1658).

28. On 13 December 1984, DCAS attorney Carl Heringer orally advised ACO Liebman that FII was deemed solvent and all its contract costs were negotiated as direct costs, for which progress payment could be made (ex. FT074 at 2; tr. 1684, 1720). On 14 December 1984, FII told ACO Liebman that DDD had advanced no money and said that it wanted an arrangement in place to deal with FII's creditors, and FII was looking for less expensive financing, such as Broadway Bank (ex. G-15; tr. 356, 1499, 1703- 04, 1743-44).

29. On 17 December 1984: (a) FII proposed to change the progress payment liquidation rate to 82.6% (ex. FT076), and (b) the ACO and others called Noel Siegert of DDD about extending credit to FII. Mr. Siegert said that before DDD could extend credit to FII, an arrangement for settlement of FII's prior creditors would have to be in place; DCASMA-NY had to confirm that it intended to pay progress payments; and SBA had to confirm that it would guarantee repayment of credit extended. (SR4, tab 17; tr. 1499-1500) Soon afterwards, ACO Liebman told DDD's Mike Durso that progress payments were not going to be

paid until direct labor and material costs were incurred (tr. 449-50).

30. On 18 December 1984, the ACO: (a) sent a letter to FII inquiring about financing sources and repayment of past debts, and (b) rejected resubmitted PPR No. 1 on the bases of FII's need to repeat figures elsewhere set forth on the document, to enter "0" instead of "---" or blanks, and to enter 95% instead of 82.6% liquidation rate (SR4, tab 12; ex. FT422 at 02904). DCAS attorney Carl Heringer's 26 December 1984 letter to the ACO stated that in FII's contract, all costs were considered direct costs; the DAR 7-104.35(b) clause did not require physical progress for payment of progress payments, only incurred costs allocable to the contract; and there had been no post-award change in FII's financial position, which the ACO should take into account in weighing any financial bases for non-payment of the progress payment (AR4, tab F25).

31. FII's 26 December 1984 letter to ACO Liebman described eight potential sources of $4,587,000 in financing - including DDD, H. T Food's bank, H. T. Food direct, SBA guaranteed loan, subcontract retentions of 10% of material costs, payment for first 500,000 MRE cases, equipment manufacturer/lessor financing, and second mortgages on equipment -- which was more than the $415,164 working capital and $1,500,000 capital equipment financing that FII calculated it needed (SR4, tab 13).

32. After giving audit results on resubmitted PPR No. 1 to the ACO on 20 December 1984, DCAA's 4 January 1985 report recommended payment of $0, citing submission of indirect costs, lack of proof that FII's costs incurred had been booked or had been paid, and FII's insolvency (SR4, tab 15; tr. 1689). Upon learning that DCAA found no proof of booked costs, FII took its books to the ACO's office on or

about 28 December 1984 (tr. 445). DCAA re-audited PPR No. 1 on 14 January 1985, noted that the costs FII incurred were booked, but reiterated its other conclusions (SR4, tab 21).

33. ACO Liebman's 4 January 1985 letter to FII said that he was considering suspending progress payments because FII was in such unsatisfactory financial condition as to endanger contract performance since DDD would extend no credit to FII until an arrangement was in place to settle FII's pre-contract debts, a term not in DDD's 9-10 August 1984 financial commitment letters to FII; DCAA had no proof of payment of some costs and found other costs incurred by H. T. Food; and FII had made no physical progress in performing the MRE-5 contract (SR4, tab 16).

34. FII's 14 January 1985 PPR No. 2 requested $299,683, including $89,500 for rent and $16,089 for taxes, and stated a 95% liquidation rate, as did all subsequent PRRs. The ACO requested an audit of this and every other PPR submitted under the contract. (Ex. FT422; tr. 1509) DCAA questioned the entire amount of PPR No. 2 on the same bases raised on PPR No. 1 (AR4, tab F41).

35. On 17 January 1985, FII proposed to assign the MRE-5 contract payments to H. T. Food and to Broadway Bank and Trust Co. (ex. FT087). On about that date Henry Thomas met with Dick Lanza of Broadway Bank. Mr. Thomas called ACO Liebman to confirm the contract cash flow information for assignment of claim purposes. ACO Liebman refused to do so. Without such confirmation, Broadway Bank declined to provide credit to FII. (Tr. 450-54)

36. In the same time frame, FII asked the owner of its leased building, Richard Penzer, to finance MRE-5 contract

equipment and working capital. Mr. Penzer contacted ACO Liebman about progress payments to confirm the circumstances for providing such financing. ACO Liebman told Penzer that, even if Mr. Penzer financed FII through Chemical Bank, and even after Chemical Bank called ACO Liebman and confirmed Mr. Penzer's net worth, he, Liebman, would deal only with a bank. (Tr. 799, 809- 18)

37. FII asked Mr. William Robbins to finance about $2.5 million for MRE-5 contract equipment and working capital. Mr. Robbins reviewed FII's cash flow statements and telephoned ACO Liebman to verify the 95% progress payments. When ACO Liebman heard that Mr. Robbins was not a bank, he refused to talk to him. (Tr. 854, 858-60, 862-66, 868) FII suggested that Mr. Robbins place funds in Citibank, and have Citibank approach ACO Liebman (tr. 867). Citibank Branch Manager Clarence Stanley and Henry Thomas met with ACO Liebman to discuss release of progress payments. After a heated exchange, ACO Liebman ran out of the room. After Mr. Thomas reported that meeting to Mr. Robbins, the latter declined to provide FII financing. (Tr. 879-82)

38. FII's 18 January 1985 letter to the ACO reported that all FII's first article samples had been approved as of 16 January 1985, it had firm commitments with all its primary subcontractors, and FII attributed its inability to conclude financing arrangements to the ACO's having provided incorrect information to FII's prospective financial backers and his refusal to pay progress payments promptly (SR4, tab 22).

39. On 31 January 1985, FII ordered Doboy sealers and conveyors for $180,330 and Koch Multi-Vac accessory and cracker packaging equipment for $311,645 (exs. FT086, FT098, FT427; tr. 527-28).

40. The ACO's 6 February 1985 letter returned PPR Nos. 1 and 2 to FII unpaid and advised it that progress payments were suspended due to FII's unsatisfactory financial position, since DDD had withdrawn any credit commitment until an arrangement was made to settle FII's debts; FII had neither applied for nor received loans from any other "financial institution;" FII was "insolvent" with a deficit net worth of about $3.7 million; FII was the defendant in numerous claims arising from non-payment of bills; and H. T. Food, which was committed to provide financing to FII, had no bank of record and no evidence that it was a viable concern (SR4, tab 26).

41. On 11 February 1985: (a) Performance Financial Services, Inc. (PFS) committed to FII to provide accounts receivable financing and $1,000,000 for plant equipment (AR4, tab F46), and (b) Bankers Leasing Association, Inc. (BLA) agreed with FII to finance 80% of accounts receivable under the MRE-5 contract, not to exceed $13,758,342 (ex. FT094). On 20 February 1985, FII requested PFS to purchase $1.6 million in production equipment, and to lease such equipment to FII (ex. FT098).

42. In mid-February 1985 meetings and discussions, DLA and DCASMA-NY personnel advised FII that release of progress payments depended on its obtaining a $3.8 million line of credit from a financial institution and novating the contract from FII to H.T. Food, purportedly to protect the Government from FII's unsecured creditors (SR4, tab 27; AR4, tab F49; ex. FT104; tr. 1798, 1807). FII's 22 February 1985 letter to the ACO and PCO advised that FII and H. T. Food were preparing a novation agreement to be sent for the ACO's consent (SR4, tab 29).

43. On 25 February 1985, FII submitted PPR No. 3, dated 8 February 1985, in the amount of $231,555, including

$89,500 for rent and $16,089 for taxes. ACO Liebman requested an audit; DCAA recommended paying $0, reiterating its previous reasons. (Ex. FT422) Due to lack of progress payments, FII put building repairs and renovations on "hold" (AR4, tab F51; ex. FT428).

44. On 28 February 1985, BLA approved a $5 million loan commitment for FII, with assignment of the MRE-5 contract payments to BLA (SR4, tab 36).

45. In March 1985 AT&T installed a networked, automated, building management and control system in FII's facility (tr. 502-04). ACO Liebman knew that this system was needed for contract performance (AR4, tab F87; tr. 1812-14). AT&T's Jim McGowan called ACO Liebman to confirm progress payment financing, but Liebman refused to do so, whereupon AT&T repossessed and removed its equipment (SR4, tab 38; tr. 505-06). On 29 March 1985, FII sought PFS financing for six AT&T personal computers, without networking or AT&T technical support (ex. FT112; tr. 506- 07).

46. On about 15 March 1985 the Government approved FII's Inspection Plan for MRE-5 assembly. That plan provided:

> Moving Lot Sampling/Inspection: Will be utilized for government verification inspection for normal production of all end items (crackers and accessory packet and final case). Cracker and accessory packet samples will be selected and inspected after sealing. Point of sample selection and inspection for final assembly cases will be after case is strapped and final markings are applied, but prior to palletization.

That plan provided for a "Stationary Lot Sampling/Inspection" on palletized cases only in the event of rejection, rework or reinspection of lots. (Ex. FT106; tr. 2084- 85)

47. On 20 March 1985, FII sent to ACO Liebman for consent, BLA's 28 February 1985 commitment letter to finance $5 million with assignment to BLA of the contract payments. BLA sent to ACO Liebman a 25 March 1985 addendum to the commitment letter, to confirm the financing upon the novation to H. T. Food (SR4, tabs 40, 42).

48. On 26 March 1985, FII and H.T. Food entered into a Novation Agreement, transferring FII's interest in the contract to H.T. Food. The Government approved the novation agreement on 17 April 1985. (Stip., ¶ 36) On 3 April 1985, H.T. Food changed its name to Freedom NY, Inc. (hereinafter FNY), which name change the ACO recognized in unilateral modification No. A00002 on 15 August 1985 (SR4, tab 61). ACO Liebman admitted that he would have released progress payments to FNY because the PFS-BLA financing was acceptable, even in the absence of the novation (tr. 1805-07).

49. On 28 March and 2 April 1985, FNY requested delay in delivery of GFM until 15-30 May 1985, since its building was not yet ready to receive the GFM. The PCO's 9 April 1985 letter to FNY denied that request and gave FNY 10 days to cure its delinquent performance. (SR4, tab 44) On 8 April 1985, Richard Penzer sold the premises leased to H. T. Food to Pilot Realty Co. (ex. G-18 at 16).

50. On or about 10 April 1985, FNY submitted a new PPR No. 1 in the amount of $1,766,923, which superseded the earlier requests, and, according to DCAA, included $730,073 in rent and taxes (stip., ¶ 37; ex. FT422).

51. ACO Liebman's 19 April 1985 letter to Citibank stated that progress payments would not be paid until FNY responded to, and resolved, the cure notice, and that $620,000 of PRR No. 1's $1,766,923 appeared to be payable (AR4, tab F69). Citibank wrote to BLA on 22 April 1985 saying that Citibank would not release the $960,000 received from BLA for FNY's account without BLA's authorization (ex. FT199).

52. FNY's 19 and 23 April 1985 replies to DPSC's cure notice reported continued building repairs, urged release of progress payments or documentation to release BLA financing, and proposed to extend the delivery schedule at a $100,000 price reduction, without admitting responsibility for the delay (AR4, tabs F70, F71). On 6 May 1985, the ACO approved and made payment of $1,700,073 on new PPR No. 1, thereby lifting the suspension of progress payments, but also disallowing $66,192, representing "capital" costs, of which about $22,000 were for office automation equipment (stip., ¶ 37; ex. G-95). From 15 November 1984 to 6 May 1985, landlord Richard Penzer did not evict H. T. Food/FII, but "carried" overdue rentals, taxes, utilities, insurance and guard service costs (tr. 455-57, 808-09). In May 1985 FNY paid Pilot Realty, the second landlord, $100,000 for April 1985 rent (ex. G-18 at 31).

53. In May and June 1985, FNY submitted PPR Nos. 2 and 3 in the amounts of $673,074 and $535,767 (as revised), respectively. The ACO paid only $332,421 with respect to PPR No. 2 (stip., ¶ 39), disallowing accrued but unpaid labor costs, costs not related to production, and operating costs of a capital nature on the basis that such costs must be depreciated, not expensed, unless the Government granted a DAR deviation (tr. 1517-18, 1918). The ACO approved payments of PRR Nos. 3 and 4 in full (ex. FT422).

54. When PFS called ACO Liebman on 16 May 1985 to verify payment of PPR No. 2, Liebman told PFS that "there were problems with this invoice and payment was not forthcoming." Thereupon, PFS declined to finance the automated building management and control system and other capital equipment at that time. (AR4, tab F81 at Ex. III; tr. 507-08, 513)

55. FNY's 23 May 1985 letter to the PCO requested resolution of the ACO's disallowance of automated building and management control system costs (AR4, tab F74). On 4 June 1985, the PCO advised ACO Liebman that DPSC had originally agreed "to pay for these elements as 100% cost rather than insist upon depreciation" (AR4, tab F77). Nonetheless, ACO Liebman requested a DCASR legal opinion on the propriety of 100% payments (AR4, tab F79). Following the recommendation of DCASR counsel, the ACO and the PCO requested a DAR deviation to pay FNY's capital equipment costs directly rather than indirectly by depreciation (AR4, tabs F85, F87, F91; exs. FT195, FT233).

56. On 14 June 1985, the parties executed bilateral Modification No. P00011, which extended the MRE-5 delivery dates by three months, required FNY to pay $100,000, and included no contractor release of claims (SR4, tab 55).

57. On 20 June 1985, ACO Liebman told FNY and PFS that he would prepare a list of routine costs, excluding salaries and rent, approved for payment at 80% of costs (ex. G-16). The ACO did not provide such a list (AR4, tab F92; ex. FT318; tr. 512). Since neither FNY nor PFS paid the down payment on the Koch Multi-Vac equipment, on 22 June 1985 Koch canceled FNY's order (ex. FT136; tr. 530).

58. The 20 June 1985 Justification for MRE-6

authorized contract awards to three planned producers, SOPACKO, RAFCO, and FII, but stated that "CINPAC" (of Cincinnati, Ohio) might be approved as a planned producer (stip., ¶ 46). DPSC awarded MRE-6 contracts to SOPACKO, RAFCO and CINPAC (ex. FT253).

59. On 9 August 1985, FNY leased from the Teknic Corp. through BLA six used 72 inch Eastern Machine Builders Corp. turntables for assembly; 14 Production Packaging Equipment, Inc. (PPE) Model 552 and 10 Model HSB horizontal band sealers and six Model 18V vacuum sealers, 12 S&B conveyors , and a Marq Automatic Case Sealer, for the period September 1985 through May 1986 for $375,000 (as amended in November 1985) (ex. FT153).

60. The horizontal sealers did not have the production capacity and speed of the originally contemplated equipment (200 v. 425 inches per minute), and the case sealer broke down frequently in forming the heavy-duty V-2 fiberboard cases (tr. 516-21, 523-27, 904-06, 1039-41). When DCASMA inspectors observed FNY's 13 August 1985 test of the horizontal sealers to increase their rate beyond 200 inches per minute, the meal bag seals twice failed (SR4, tab 193). Due to delayed progress payments for production equipment costs, BLA delayed lease payments to Teknic, and FNY delayed paying overdue repair balances. Consequently, Marq required COD payment for case sealer repairs, and PPE refused to ship repair parts. (Exs. FT215, FT216, FT225)

61. DCAA's 13 August 1985 audit report on PPR No. 5 stated that FNY's "current cost accounting system is not considered adequate for accumulating contract costs in support of progress payment requests," citing failure of FNY's books to include entries for discounts, occupancy taxes, subcontractor invoices, a cash disbursement journal,

and subsidiary ledgers (SR4, tab 60).

62. On 21 August 1985 Richard Penzer, H. T. Food, and Pilot Realty executed an "Agreement of Compromise and Settlement," stating that H. T. Food had paid rentals of $395,000 to Penzer; increasing Penzer's original lease rentals from 15 November 1984 to 31 March 1985 by $335,000; releasing H. T. Food's option purchase claim against Penzer; and providing:

> Penzer agrees to release any and all claims he may have against H. T. Food for unpaid rent in the amount of $400,000 and hereby authorizes H. T. Food to keep the sum of $400,000 . . . as accrued unpaid rent . . . .

(Ex. G-22) Mr. Penzer was not sure whether he gave FII a check or a credit (tr. 823-24).

63. On 23 August 1985, ACO Liebman again suspended progress payments on the basis of the foregoing DCAA assertions (SR4, tab 62). As a result, ACO Liebman did not authorize payment of FNY's PPR Nos. 5, 6, and 7, dated 5 July, 8 August and 11 September 1985, respectively (ex. FT422).

64. The PCO's 30 August 1985 letter gave FNY 10 days to cure (i) the alleged accounting system deficiencies cited by the ACO, and (ii) the absence of much production equipment needed for contract performance at FNY's facility (SR4, tab 63).

65. On 4 September 1985, the PCO learned that the capital equipment cost deviation request had been denied. The Office of the Secretary of Defense again denied such deviation request in February 1986. (Exs. FT168, FT225)

66. FNY's 13 September 1985 reply to the PCO's cure letter stated that the ACO/DCAA contentions about FNY's accounting system and contract charges were based on a misunderstanding of the originally negotiated contract price and cost terms, FNY had received all equipment needed for performance and was installing and testing such equipment at that time, and respondent was responsible for contract performance delays. FNY proposed extending the delivery schedule. (SR4, tab 67)

67. Jordan Fishbane, an ex-Army auditor, CPA, and FNY's expert witness in finances (tr. 942-43, 950), opined that FNY's omitted entries were "human errors," not accounting system deficiencies, and its PPRs were documented completely, allowing him to support each progress payment to the penny (tr. 983-86). We have examined FNY's PPR support documentation, and find that DCAA's accounting contentions were baseless.

68. On 25 September 1985, respondent paid progress payments for FNY's utility bills totaling $11,076.75 to prevent loss of electricity and gas at the facility (ex. G-14 at 16).

69. FNY resubmitted PPR No. 7 in the cumulative amount of $2,994,154 on 2 October 1985 (SR4, tab 73).

70. On 2 October 1985, DCASMA calculated that FNY needed an additional $500,000 of outside financing to complete performance to the extended delivery schedule it proposed. On the next day the parties agreed to increase the progress payment ceiling by $1,000,000 when each of the first four 50,000 case increments was delivered, and to extend the delivery schedule by 60 days, for a $100,000 price reduction to be made after April 1986. (SR4, tab 75 at 5-7; AR4, tab F100; ex. FT186) That agreement was

incorporated in bilateral Modification No. P00018, executed 15 November 1985, which modification included no contractor release of claims (SR4, tab 85).

71. ACO Liebman authorized a $1,913,726 payment on resubmitted PPR No. 7 on 11 October 1985 (ex. FT422). The ACO reduced PPR No. 7, and later PPRs, by applying a percentage of physical completion factor (AR4, tab F90).

72. From PPR No. 8, submitted on 11 October 1985, ACO Liebman deducted a $400,000 payment FNY purportedly received from Richard Penzer, who bought FNY's purchase option (provided in ¶ 40 of its lease) in 1985, to disencumber sale of the property to Pilot Realty. That $400,000 had been included and paid in PPR No. 1, and FNY's July 1985 balance sheets reported that amount as income. The ACO regarded the payment as a "rental income credit," pursuant to the 21 August 1985 settlement agreement. (SR4, tab 60; exs. G-22, FT052 at 00739, FT162; tr. 818-24, 986-89, 1821- 24, 1870-74).

73. In October 1985 DAR Appendix E provided:

> **E-501 Percentage or Stage of Completion.** Progress payments based on a percentage or stage of completion will be confined to contracts for construction . . . shipbuilding and ship conversion, alteration or repair. For all other contracts, . . . the only types of progress payment provisions will be those based on costs, as authorized herein.

(Ex. G-1) On 17 October 1985, FNY protested to DCASMA such unauthorized deductions based on physical percentage of completion (ex. FT193).

74. When MRE production began on 29 October 1985 (SR4, tab 193 at 29), FNY performed "Moving Lot Sampling/Inspection" pursuant to its approved inspection plan. Two weeks later the Army Veterinary Inspectors (AVI) performed "Stationary Lot Sampling/Inspection" while awaiting confirmation that FNY's strapping was adequate (tr. 2086-87). In November 1985 AVI corrected its inspection procedure and began moving lot inspection, rejecting 31,817 cases in FNY's lots 2 through 20 (ex. FT243 at 01649).

75. FNY hired Dave Corry, an ex-AVI inspector at SOPACKO, to train FNY's inspectors, and AVI brought in experienced inspectors to train the AVI inspectors at FNY to identify valid defects. By 19 December 1985, AVI's rejection rate decreased markedly (SR4, tab 194 at 2; tr. 2089-90, 2095-97). By 27 January 1986, ACO Liebman reported that FNY's strapping was acceptable (ex. FT437).

76. FNY failed to make the rescheduled November and December 1985 deliveries. On 6 December 1985 and 2 January 1986, respondent terminated for default the 49,758 and 65,000 case increments. On 23 January 1986, those terminations were formalized in unilateral Modification No. P00019. FNY disputed and took an appeal from those terminations (ASBCA No. 32570). (Stip., ¶ 44; SR4, tab 103; ex. FT211)

77. To meet IPP mobilization needs, DPSC needed delivery of the terminated 114,758 MRE-5 cases (SR4, tab 90). On 9 December 1985, FNY rejected the Government's request and refused to release all prior claims. The parties agreed that DPSC would reprocure those 114,758 cases and would reinstate in FNY's contract another 114,758 cases in MRE-6 configuration to be delivered after the MRE-5 deliveries, contingent upon timely deliveries to new, extended delivery dates. (SR4, tab 100)

78. FNY directed Sterling Bakery, a CFM supplier, to "ship-in-place" FNY's order. On 7 January 1986, DPSC countermanded FNY's direction and ordered Sterling to divert those CFM components from FNY to RAFCO to support the reprocured MRE-5 units (exs. FT436, FT255). That diversion led to a brownie "outage" (shortage) on 30 January 1986 which halted FNY production for 11 days (SR4, tab 194 at ¶ 3). Later, the 29 December 2000 Termination Supplemental Agreement (Modification No. A00004; finding 124, infra) stated that of its $387,455 claim for CFM "seized" by respondent, FNY was entitled to $193,727 (Memorandum of Agreement (MOA) at 5).

79. Pending resolution of DPSC's 11 December 1985 cure notice regarding FNY's delinquent December 1985 increment, ACO Liebman released no progress payments (ex. FT239). On 21 January 1986, PCO Frank Bankoff ordered ACO Liebman to withhold progress payments until FNY signed a modification embodying the 9 December 1985 agreement, at which time the cumulative amount of $3,603,497 in progress payments was unpaid and pending (exs. FT219, FT422; tr. 1468-70).

80. On 29 January 1986, DPSC notified FNY that it planned to solicit a 4.5 million case MRE-7 IPP requirement, expected to involve three separate awards at 47 percent, 33 percent and 20 percent of the calendar year 1987 requirement (stip., ¶ 46). The 15 April 1986 Justification for MRE-7 authorized solicitation of SOPACKO, RAFCO, FNY, and CINPAC, but did not state how many contracts were to be awarded (ex. FT247).

81. Bilateral Modification No. P00020, executed on 29 January 1986, reduced the quantity of MREs by 114,758 cases, provided for a 60-day delivery schedule extension and deletion of the phrase in § L-4 "or 50% of the contract value

whichever is lesser" so as to preserve $9,000,000 as the initial progress payment limitation despite the diminished contract price on account of the terminated cases in consideration of a $100 price reduction, added the provision:

> In the event the contractor meets the 1-31 Jan 86 through 1-30 Apr 86 increments as set forth . . . above, the Government may reinstate the 114,758 cases terminated for default . . . . Reinstatement will be at the sole discretion of the Government.

and included no contractor release of claims (SR4, tab 104).

82. On 30 January 1986, ACO Liebman authorized payment on FNY's PPR Nos. 10 and 11, including a $44,539 "adjustment" of the purportedly "actual" $374,180 option purchase payment previously "estimated" at $400,000 (SR4, tab 89; AR4, tab F232).

83. On 11 March 1986, Government inspectors found "micro- holes" in retort pouches containing CFM applesauce, beans and tomato sauce, and meatballs prepared by FNY's subcontractor Star Food Processing in Texas. All such items in stock were warehoused on "medical hold." (SR4, tab 193 at 52; tr. 2098-2100) Beginning on 11 March 1986, DPSC authorized CFM/GFM substitutions to maintain MRE deliveries. Some substituted items were not the same size as those replaced, causing case bulging and sealing problems, impacting FNY's production efficiency (tr. 2103-04).

84. On 18 March 1986, starting with PPR No. 13, when FNY's costs incurred plus estimated costs to complete first exceeded the contract price, ACO Liebman withheld $59,644.29 due to the disparity between the percentages of physical progress and incurred costs; he also withheld

$284,507 pending FNY's resubmission of costs incurred and estimated to complete; and he applied a "loss ratio" to all progress payments (AR4, tab F232; tr. 1547-48; ex. G-95). DAR § E-524.5(b) prescribed a loss ratio of the "revised contract price" divided by the sum of costs incurred and estimated to complete. ACO Liebman applied what he called a "modified loss ratio," considering costs only on the "instant" progress payment, rather than total costs. (Ex. G-1; tr. 1550-51) The record does not show that use of this loss ratio was less favorable to appellant than the prescribed loss ratio.

85. On 20 or 21 March 1986, FNY submitted a "draft" $3.4 million claim to DPSC. That claim is not in evidence. DPSC and ACO Liebman discussed that claim with FNY on 26 March 1986, saying they were willing to reinstate the 114,758 terminated cases, to extend the delivery schedule at no cost, to refund the two $100,000 amounts in Modification Nos. P00011 and P00018, and to pay $500,000 in disallowed, capital-type costs. The parties did not resolve the claim because FNY insisted on a guaranteed MRE-7 contract. (AR4, tabs M20, M22; SR4, tabs 55, 85, 194 at 7)

86. FNY retained lawyer David Lambert to seek to resolve FNY's claim with DLA. In March-April 1986 Mr. Lambert and FNY consultant Frank Francois discussed with DLA's Director of Contracts, Raymond Chiesa, and his General Counsel, Karl Kabeiseman, waiving or releasing FNY's pending claim in return for Government commitments to negotiate an MRE-7 contract with FNY, to process a guaranteed "V-Loan" of about $2.7 million to finance contract performance, and to award contracts to FNY under the SBA 8(a) program. (Tr. 622-28, 833-38, 840-47)

87. Due to a CFM maple nut cake outage, from 10 to 21 April 1986 FNY performed no final MRE-5 assembly,

but continued to make accessory and cracker packets (SR4, tab 193 at 62-64).

88. FNY submitted a $5,709,560 certified claim to DPSC on 24 April 1986, alleging that DCASMA-NY failed to make full and prompt progress payments, interfered with contract performance, required performance to standards higher than specified, and improperly recouped monies by withholdings from progress payments. The claim did not address award of an MRE-7 contract. (Ex. FT266)

89. On 6 May 1986, Mr. Lambert sent Mr. Chiesa a 2 May 1986 draft FNY letter to PCO Frank Bankoff for submission with the proposed modification. The 2 May letter stated that DLA and FNY had agreed to settle FNY's $3,481,768 claim in return for Government commitments to (1) negotiate a fair and reasonable MRE-7 contract with FNY based on its existing mobilization capacity; (2) process a "guaranteed loan" to be submitted by BLA under 50 U.S.C. App. § 2091 and applicable FAR and DAR regulations in an amount not to exceed $2.7 million to finance MRE-5 contract costs; (3) assist FNY to obtain contracts under the 8(a) program; and (4) assist FNY in reworking 46,000 MRE-5 cases on "medical hold." (ex. FT273) PCO Bankoff received and read that 2 May 1986 letter (ex. G- 37; tr. 1267).

90. To resolve the "micro-hole" problem in Star Foods' retort pouches, DPSC issued unilateral Modification Nos. P00024, dated 14 May 1986, and P00026, dated 27 June 1986, that required FNY to inspect 200 pouch samples per lot for micro-holes, and to send 50 such samples to AVI for "Zyglo" florescent dye testing, and gave FNY the right to equitable adjustments for the changes. FNY visually inspected retort pouches for micro-holes for six to eight months, thereby increasing its production time. (SR4, tabs

116, 127; ex. FT435; tr. 2105-08)

91. Mr. Lambert's 15 May 1986 letter to DPSC withdrew FNY's draft 2 May 1986 letter to the PCO (ex. G-37). Mr. Chiesa's 15 and 20 May 1986 internal notes, undisclosed to FNY at the time, state that he agreed to process the loan guarantee and to provide production assistance, but he believed that it was inappropriate for DLA to commit to a follow-on competitive contract to FNY (exs. G-38, -39).

92. Henry Thomas understood that Messrs. Chiesa and Lambert had agreed that FNY would waive its $3.4 million claim and DLA would commit to process a $2.7 million V-loan for FNY and to negotiate an MRE-7 contract with FNY, although the Government could not "guarantee" an MRE-7 contract to FNY (tr. 629-42, 2052- 58).

93. On 29 May 1986, Henry Thomas and consultant Francois met with PCO Bankoff. Mr. Thomas had a 28 May 1986 letter to DLA's R. Chiesa (ex. G-40), conforming in substance to the 2 May 1986 version, attached to proposed Modification No. P00025 (P00025). Mr. Bankoff saw the 28 May date of that letter, and provided an essentially identical FNY 13 May 1986 letter to Mr. Chiesa, which Mr. Thomas attached to Modification No. P00025. Mr. Bankoff said that he would send that letter to Mr. Chiesa for approval. At 11:00 a.m. DPSC telefaxed to DLA headquarters a copy of the signed 13 May letter. Mr. Thomas heard no objection to the 13 May letter, understood that Mr. Chiesa had agreed, and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025. (AR4, tab M25; ex. FT280; tr. 643-51, 2047-49)

94. According to Mr. Bankoff, on 29 May 1986 he

told FNY that he knew nothing of any side agreement FNY made with DLA: '"There is no side agreement. There is no attachment to the modification. There is no addendums. [sic] . . .' And then it was like, 'Forget it. We won't sign the mod."' (tr. 1267-71, 1386). Considering the documents in evidence and Mr. Bankoff's demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony, we attach no probative weight to Mr. Bankoff's denial of the "side agreement" attached to P00025.

95. P00025, signed by both parties on 29 May 1986, recited that FNY had submitted a $3,481,768 certified claim; provided that the terminated 114,758 cases were reinstated in MRE-6 configuration, with a price adjustment therefor under the Changes clause; FNY was to withdraw ASBCA No. 32570 (the 114,758 case default termination appeal) with prejudice; extended the schedule for the undelivered balance of MREs to 1 May through 31 October 1986; stated that FNY was to be paid $399,111 for capital equipment items ($522,218 total, less $123,107 in previous payments); and rescinded the $100,000 consideration for each of Modification Nos. P00011 and P00018, thus increasing the contract price by $200,000. P00025 finally provided in paragraph 5:

> With execution of this modification, Freedom waives all claims for all happenings and/or occurrences which have arisen to date under law and/or relating to the contract, DLA13H-85-C-0591, except for any claims that may have arisen from the manufacture of contractor furnished material by Star Food Processing under Government specifications: MIL-B-44057A, MIL-B-44066A, MIL-F-44067A. Both parties have had time and opportunity to review this Agreement and

> consult with counsel. Both parties expressly state that the aforesaid recitals are the complete and total terms and conditions of their Agreement and that this Agreement has been entered into free from duress or coercion.

(SR4, tab 119) Respondent paid FNY $399,111 on 13 June 1986 (ex. FT422).

96. In a letter to Mr. Thomas dated 30 May 1986, Mr. Chiesa expressed his disagreement with the "May 13" letter, cautioned that the letter jeopardized the integrity of the recently negotiated settlement and reemphasized that the settlement reflected in Modification P00025 "stands on its own" (stip., ¶ 55).

97. On 4 June 1986, FNY proposed an 88.73% "loss ratio factor" for PPRs Nos. 13-16, resulting in a proposed total payment of $1,172,654 thereon. ACO Liebman agreed, and authorized payment of that amount to FNY on 18 June 1986. (AR4, tab F136; ex. FT422)

98. Mr. Thomas' 25 June 1986 letter to Mr. Chiesa reiterated FNY's understanding that the DLA commitments were inappropriate for inclusion in Modification No. P00025, and were agreed upon in a separate letter (AR4, tab F140).

99. In June or July 1986 FNY learned that about six months before David Lambert met with DLA, the Department of Defense had changed its policy and discouraged and "shut down" "V-Loans," though DLA did not so advise him (tr. 838-40, 848-51).

100. In mid-July 1986, FNY notified DPSC of a GFM jelly outage to begin 16 July 1986 (SR4, tab 141 at 2).

Bilateral Modification No. P00028 (P00028), effective 7 August 1986, extended the overall delivery schedule a total of eight days to 12 November 1986. The $13 million limit on progress payments was to be increased in steps, based on completion of successive 80,000 case increments, as follows: to $14 million upon completion and acceptance of a cumulative total of 410,000 cases; to $15 million at 490,000 cases; and to $15.8 million at 570,000 cases. P00028 stated, inter alia, that FNY's delivery delay was "partially excusable due to lack of [GFM] jellies for eight production days" and FNY waived all claims "whatsoever for any consideration or damages, monetary or otherwise, resulting from lack of [GFM] jellies during the period 16-28 July 86." (SR4, tab 144; findings 70, 81)

101. On 19 August 1986, the ACO approved payment of $704,068 on PPR No. 18 (ex. FT422). At a 26 August 1986 meeting with FNY and DLA, Assistant Secretary of Defense James P. Wade stated that the Defense Department would not support FNY's guaranteed loan (exs. G-46, -49), and no guaranteed loan was made.

102. Despite reworking about 40,000 MRE-5 cases and correcting problems with the case erector/bottom sealer of the automatic case sleever that had impeded production, FNY shipped only 46,260 of the 80,000 cases due by 10 September 1986 (stip., ¶ 64). Contributing to the production shortfall were a 9-day delay due to lack of GFM fruit and potato patties, GFM substitutions and reverse substitutions, and pouch tears (SR4, tabs 153, 194; AR4, tab M33).

103. FNY responded to the RFP for the MRE-7 requirement. A 24 September 1986 pre-award survey for that procurement reviewed FNY's financial capability and $2.4 million current loss position, but was favorable and recommended a complete award to FNY of an MRE-7

contract. (Stip., ¶ 68; AR4, tab F163)

104. On 25 September 1986, DPSC amended the MRE-7 solicitation to provide for as many as four awards (AR4, tab M35).

105. On 8 and 23 September 1986, the ACO approved payments of $200,219 and $311,447, respectively, on FNY's PPR Nos. 19 (showing a $2.2 million loss) and 20 (showing a $3.5 million loss) (ex. FT422). At the end of September 1986 a GFM cream outage caused a one-week FNY production shutdown (AR4, tabs F164, M44).

106. On 3 October 1986, the ACO approved a $700,000 payment on PPR No. 21, which FNY had submitted on 1 October 1986 for $2,165,098 (SR4, tab 162(C)). PCO Bankoff told ACO Liebman to withhold payment of PPR No. 21 until FNY signed proposed Modification No. P00029 (AR4, tab F164). We find that both men knew of FNY's financial distress. Mr. Bankoff's 7 October 1986 letter to FNY stated that upon execution of Modification No. P00029, the progress payment ceiling would be $14,900,725, leaving "a balance of $721,887.00 available to you, [[which] will be paid to you by DCASMA N.Y. against progress payment requests" (AR4, tab F165).

107. Bilateral Modification No. P00029, executed on 7 October 1986, recited that FNY's "delinquency or anticipated delinquency may be the responsibility" of FNY, extended the delivery dates for the 210,062 case MRE balance by about one month for a $100 price reduction, and stated:

> C. In further consideration of the aforesaid extension of delivery schedule, the contractor for itself, its successors and assigns, releases

> and forever discharges the Government of and from all manner of action, causes of action, suits, proceedings . . . damages, claims, and demands whatsoever, in law or equity or under administrative procedures which, against the Government, the contractor ever had, now has, or may have for or by reason of any matter, cause, or thing whatsoever arising out of award and performance of the subject contract to date, except claims relating to Zyglo testing implemented in modifications P00024 and P00026 or monies due or to become due as payment for product delivered to and accepted by the Government.
>
> . . . .
>
> H. This document contains the complete agreement of the parties. There are no collateral agreements, reservations or understandings other than expressly set forth herein. It is agreed that no subsequent modification of this agreement shall be binding unless reduced to writing and signed by both parties.

(SR4, tab 159)

108. On 7 October 1986, BLA stated to DCASMA-NY that it would issue FNY a $6 million line of credit for the MRE-7 contract (AR4, tab F163).

109. A $721,887 payment was issued on PPR No. 21 on 9 October 1986 (ex. FT422), bringing cumulative progress payments to $14,894,725 and the total amount disbursed under the contract to $15,876,512 (stip., ¶ 69).

110. On 15 October 1986, FNY informed the ACO of impending "serious stock shortages of both CFM and GFM components that would impact on performance of the MRE[-6] assembly portion of the contract" (AR4, tab M44). The PCO was also advised that specific GFM meat entree items for the MRE-6 configuration (ground beef, diced turkey, frankfurters and ham slices), which should have been provided by the end of September, had still not been received as of 15 October (stip., ¶ 72). FNY's 17 October 1986 letter informed the ACO that shortage of GFM components was- -

> . . . our most immediate concern. To date we have not been supplied with 8 oz. pouches of Ground Beef with Spice Sauce, Diced Turkey, or Beef Slices. The final 114,754 [sic] cases cannot be assembled without these products.

(SR4, tab 160)

111. ACO Liebman withheld from FNY's 21 PPRs, at least $406,670 for his "modified loss ratio," and $400,000 (corrected to $374,180) for "rental income credit" (ex. G-95). After FNY superseded the previous FII PPRs and resubmitted a new PPR No. 1 on 10 April 1985 (see finding 50), respondent paid all of FNY's PPRs more than 10 days after submission except PPR No. 4, for a total of 317 non-concurrent days of progress payment delinquencies, but with no proven impact on performance of the contract. On 20 October 1986, FNY submitted PPR No. 22 for $1,433,211 at 95% of costs incurred, net of prior PPR payments. Respondent did not pay PPR No. 22. (Ex. FT422)

112. FNY's 22 October 1986 letter advised the PCO that all CFM needed to begin producing MRE-6 configured cases was received, but that it was shutting down assembly production of MRE-6 cases, effective immediately, due to

"lack of GFM" beef slices, diced turkey, ground beef, and ham slices (SR4, tab 161). On 23 and 24 October 1986, FNY laid off 286 (of 400) production workers. DPSC authorized GFM substitutions, which disrupted FNY's production and required it to store incomplete MREs while awaiting substituted GFM. (AR4, tabs F172, F183, M44; tr. 895-96)

113. On 29 October 1986, ACO Liebman ordered liquidation of FNY's progress payments at 100% because it was "experiencing serious financial difficulties and has ceased full scale production" (AR4, tab F173). By about 5 November 1986, FNY rehired workers and resumed MRE assembly (SR4, tab 193 at 104). FNY was delayed by the need to train new and rehired workers (tr. 1083-88).

114. In a 5 November 1986 telephone conversation with FNY's vice president, the ACO advised that he would not make a further progress payment because, inter alia, the Government was unwilling to "increase exposure until outside financing flows or MRE 7 is awarded." The ACO subsequently acknowledged that FNY's PPR No. 22 would have been payable "in the amount of $327,893." (Stip., ¶ 80)

115. Notwithstanding its production difficulties in November 1986, FNY still wished to complete the contract and to receive an MRE-7 contract award. FNY advised the PCO that, if it received an MRE-7 award, BLA would resume financial support, and production under the MRE-5 contract balance could start up in January 1987.

116. FNY submitted the lowest offer for the portion of the MRE-7 requirement for which it was eligible. On 18 November 1986, the PCO requested DCASMA-NY to perform another pre-award survey to determine FNY's responsibility for an MRE-7 award. Although the initial survey had recommended award for 867,792 MRE-7 cases,

the PCO justified the second pre-award survey on the ground that, subsequent to the initial survey, FNY "has run out of financial resources and has shut down production" on the MRE-5 contract. (Ex. G-58) As of 28 November 1986, FNY delivered 512,462 MRE cases, including 505,546 MRE-5 and 6,916 MRE-6 configured cases (SR4, tab 194 at 38).

117. In November 1986, DLA decided to award three MRE-7 contracts (AR4, tab M54). The second pre-award survey of FNY recommended "No-Award" (stip., ¶ 84). On 4 February 1987, SBA declined to issue a Certificate of Competency to FNY (SR4, tab 171). DPSC negotiated no MRE-7 contract with, and awarded no 8(a) contract to, FNY.

118. On or before 5 March 1987, the PCO requested FNY to perform a physical inventory on all GFM components and make a final inventory report. Later in March Mr. Thomas informed the PCO that FNY was going to be evicted at the beginning of April 1987. On or about 23 March, Government personnel entered the premises and began removing GFM and finished product. (Stip., ¶ 88)

119. The 23 March 1987 Justification for MRE-8 authorized solicitation of SOPACKO, RAFCO, FNY and CINPAC, but did not designate how many contracts were to be awarded (ex. FT328).

120. On 22 June 1987, PCO Bankoff terminated the contract for default. On 20 June 1991, PCO Bankoff claimed repayment of $1,630,747.28 in unliquidated progress payments (ex. FT389).

121. On 1 May 1991, FNY filed a certified claim for an adjustment in the amount of $21,959,311, based on alleged constructive changes and breaches by Government officials from the inception of the contract, including failing

to pay for product accepted. The claim included nearly $6 million in increased costs and lost profits under the contract; $375,000 for "income improperly offset and taken by ACO;" $1.2 million for capital equipment and leasehold improvements "lost through insolvency;" and $14.4 million in "[l]ost profits on promised future MRE procurements (MRE7-MRE11)." FNY did not claim any right to a convenience termination settlement, or Prompt Payment Act (PPA) interest. (AR4, tab F1) Appellant timely appealed from the PCO's denial of that claim, which was docketed as ASBCA No. 43965.

122. On 29 April 1997, FNY notified DCASMA that 33 MRE-5 contract invoices for shipments (DD Forms 250) totaling $1,907,979.05 allegedly had not been paid (ex. FT404 at 3). According to Government payment office records, as understood by the termination contracting officer (TCO) James Ljutic, 28 of those 33 invoices had been "paid" by "crediting" or "recouping" the invoiced amounts against unliquidated progress payments and other alleged FNY debts owed to respondent: 4 invoices at a 95% liquidation rate, and 24 invoices (totaling $1,455,119) at a 100% liquidation rate, starting 14 November 1986. The payment office issued to BLA several "Advice of Payment" (DLA Form 477) documents itemizing groups of invoices, showing the foregoing recoupments. The remaining five invoices, Nos. FNY-0172, -0244, - 0297, 0298, and -0339, totaling $246,946.57, were not paid or credited against unliquidated progress payments. (Ex. G-92; tr. 113-19, 1129-30) In the December 2000 convenience termination settlement agreement, Modification No. A00004, the TCO agreed to pay $246,947 for invoices FNY-0172, -0244, -0297, 0298, and -0339 (Bd. ex. 1, MOA at 4; finding 124, infra).

123. On 19 May 1998, pursuant to Board order, FNY submitted a "More Definite Statement" seeking specific

performance of FNY's IPP agreement by ordering FNY to be reinstated as an MRE planned producer, and $55,489,549.29, as "business destruction damages," including failure to pay 34 DD Form 250 invoices for MREs accepted.

124. On 29 December 2000, FNY and TCO entered into a convenience termination settlement resulting in a net payment to FNY of $799,947 (Modification No. A00004). This amount reflected a loss adjustment of 25.1% (recovery rate on costs incurred of 74.9%). The modification stated:

> Based upon the outcome of the contractor's ASBCA case # 43965 it is possible that the contract price may be adjusted upward. If the Request for Equitable Adjustment of the contract price results in an increase of the contract price . . . , this settlement will be adjusted in accordance with a revised loss ratio. A re-computation of the loss ratio may result in an additional net payment to Freedom.

(Bd. ex. 1 at 3) The accompanying MOA explained:

> [U]pward adjustment of the termination settlement amount is dependent upon the Board finding that the contractor is entitled to an upward adjustment in contract price. . . . Any possible or potential compensation by the ASBCA for damages, interest, or penalties is not part of an Equitable Adjustment of the Contract Price and is not to be considered in computing a revised loss or profit.

(Id., MOA at 7)

125. Appended to FNY's post-hearing brief are 13 "QUANTUM CHARTS" which revise FNY's total claim to $48,108,217, including the following items: (a) $9,686,129 equitable adjustment for Government-caused cost overrun, (b) $1,062,138 unrecovered program investment costs, (c) $20,748,290 lost profits on post-MRE- 5 awards, and (d) $16,611,660 in "financial damages." According to FNY's brief, item (a), $9,686,129, includes an alleged $8,466,039 Government-caused cost overrun, less a $34,520 "estimate variance," plus $1,254,610 in profit at 14.88%. FNY "allocates" that $8,466,039 cost overrun as follows:

(1) $1,950,615 due to suspension of progress payments, imposition of the novation agreement, and interference with financiers, resulting in a "preproduction" delay from May to October 1985 (5 months x $390,123).

(2) $ 548,057 due to alleged use of 230 vs. 134 budgeted laborers.

(3) $1,918,158 for a 3.5-month delay of production due to unplanned, less efficient equipment (3.5 months x $548,045).

(4) $ 548,045 due to a 1-month failure to pay allowable incurred costs.

(5) $ 548,045 due to a 1-month improper rejection of MRE units.

(6) $ 822,068 due to a 1.5-month failure to receive CFM (1.5 x $548,045).

(7) $1,170,369 due to a 3-month delay arising from the Government failure to provide GFM from September to November 1986 (3 x $390,123).

(8) $ 548,045 due to a 1-month failure to make DD250 payments.

(9) $ 313,236 due to "unnecessary and unreasonable" interest costs.

(10) $ 355,155 due to material cost increases.
$8,721,793 Sub-Total

Less: (11) $ 255,754 for "Freedom's responsibility" under Mod. P00028.
$8,466,039 "Total Claimed Additional Cost."

126. FNY's allocations (1) and (7) used a $390,123 average monthly overhead plus G&A cost as a factor, and its allocations (3)-(6) and (8) used a $548,045 average monthly overhead, G&A plus labor cost factor. FNY's allocation (9) is the difference between its incurred interest costs of $484,900 stated in Modification No. A00004 (Bd. ex. 1 at 7), and its pre-award, negotiated and budgeted amount of $171,664 for (working capital) interest cost (ex. FT062 at 00910). FNY does not explain allocations (2) and (10). FNY's allocation (11) calculates the $255,754 for a two-week delay due to GFM jelly outage, which FNY released in Modification No. P00028.

127. The alleged $8,466,039 cost overrun is inaccurate, because the parties agreed in the December 2000 convenience termination settlement agreement, that FNY incurred $21,525,710 in costs during contract performance, and FNY's estimated costs to complete were $1,435,171, totaling $22,960,881 (Bd. ex. 1, MOA at 2). Absent the termination, FNY would have incurred $7,990,739 in costs exceeding the $14,970,142 costs originally negotiated and budgeted for performance (finding 17). Moreover, FNY's alleged cost overrun "allocations" are inaccurate. FNY's cost overrun allocations, Figures 6-10, cite no substantiating evidence. What little evidence supports those calculations we have set forth in finding 126.

128. We find that FNY performed the MRE-5 contract for 31 1/2 months, from 15 November 1984 (SR4, tab 10) to 22 June 1987 (SR4, tab 186). FNY admittedly

incurred no costs during the last 1 1/2 months (app. br., Fig. 5). FNY incurred $7,032,904 in manufacturing overhead costs and $3,593,672 in G&A costs during these 30 months, and incurred $2,526,746 in direct labor costs during the 13 months from November 1985 through November 1986 (Bd. ex. 1, MOA at 2; ex. FT 422 at 03915), yielding monthly averages of $234,430 for manufacturing overhead, $119,789 for G&A, and $194,365 for direct labor costs. We find that these monthly averages are sufficient for us to make a fair and reasonable approximation of FNY's damages (exclusive of profit) during periods of delay.

129. We find that respondent's conduct was the predominant, if not sole, cause of (a) the 147 days of delay from 10 December 1984 to 6 May 1985 in beginning MRE production, and (b) 88 days of delay from 15 July to 11 October 1985. FNY incurred a monthly average of $354,219 in overhead and G&A costs. Thus, that 235-day delay resulted in $2,738,206 (235 ' 30.4 x $354,219) in Government-responsible costs.

130. We find that respondent's January 1986 diversion of CFM resulted in an 11-day delay in FNY's production at the end of January 1986 (finding 78), and that lack of GFM and GFM substitutions were the principal causes of delay of FNY's production for a total of 40 days from early September through early November 1986 (findings 102, 105, 110, 112-13). FNY incurred a monthly average of $548,584 in overhead, G&A and labor costs. Thus, the foregoing 11-day delay resulted in $198,501 (11 days ' 30.4 monthly days x $548,584) and 40-day delay resulted in $721,821 (40 days ' 30.4 x $548,584) in Government-responsible costs.

131. We find that respondent's non-delivery of GFM for 160 days starting on 29 November 1986 and up to 8 May

1987 was the sole cause of FNY's incurrence of overhead and G&A costs during that period. FNY incurred a monthly average of $354,219 in overhead and G&A costs. Thus, those 160 days resulted in $1,864,310 (160 ' 30.4 x $354,219) in Government-responsible costs.

132. According to FNY's brief: (a) damage item (b), $1,062,138, includes $651,010 in capitalized leasehold improvements and $531,205 in capitalized furniture, fixtures and equipment (both figures net of expensed amounts allocated to the contract), less $257,652 in depreciation and amortization, plus $137,575 in profit at 12.88%; (b) damage item (c), $20,748,290, includes expected profit of $11,657,381 on MREs 7 to 11, calculated at 14.88% of an alleged $78,342,618 "cost base," plus expected profit of $9,090,909 on MREs from "1991 to present," calculated at 10% of an alleged $90,909,090 "cost base"; and (c) damage item (d), $16,611,660, includes $1,429,012 for DDD's unpaid loan principal; $4,900,000 in interest on BLA's $3.5 million loan balance; $8,282,648 in "Accounts payable, penalties and interest"; and $2,000,000 for "Lost salary, @ $125,000 per annum x 16 years."

133. We further find that the record does not show the specific time or cost effects of respondent's other conduct, including that relating to the improper $59,664 progress payment deduction, AVI inspection procedures and Zyglo testing, since FNY's cost overrun "allocations" did not apportion costs caused by its own defective and delayed work (see findings 74-75, 87, 102, 110).

DECISION

I.

PROMPT PAYMENT ACT INTEREST

On 26 February 2001, FNY submitted a motion for PPA interest on $799,947 it received by virtue of the parties' 29 December 2000 convenience termination settlement agreement. Respondent argues that such motion does not relate to ASBCA No. 43965. FNY's 1 May 1991 claim did not allege any right to PPA interest on a convenience termination settlement (finding 121). Therefore, the Board lacks jurisdiction to adjudicate payment of such PPA interest. We dismiss FNY's motion for PPA interest.

II.

MOTION TO STRIKE AFFIRMATIVE DEFENSES

On 30 April 2001, FNY moved to strike the affirmative defenses of statute of limitations, accord and satisfaction, waiver, and release set forth in respondent's answer because at that time respondent had submitted no post- hearing brief, and to accept FNY's supplemental brief on such defenses. On 17 May 2001, the Board determined to accept FNY's supplemental brief, and on 11 June 2001 respondent submitted its post-hearing brief. FNY has not cited any legal authority, nor is any known to the Board, holding that a party's omission or delayed submission of a brief on the merits of an appeal results in waiver of such party's affirmative defenses. We deny FNY's motion to strike respondent's affirmative defenses.

III.

ENTITLEMENT

FNY argues that it is entitled to the added costs resulting from the following Government constructive changes and breaches of contract:

(1) Improper denial of progress payments.
(2) Improper delay of progress payments.
(3) Improper deductions from progress payments.
(4) Improper suspension of progress payments.
(5) Government interference with FNY's prospective financers.
(6) Unauthorized diversion of FNY's CFM.
(7) Unauthorized liquidation of progress payments at a 100% rate.
(8) Failure to pay FNY's invoices for delivered MREs.
(9) Delays and failures to provide GFM.
(10) Improper AVI inspection procedures.
(11) Added Zyglo testing requirement.
(12) Breach of an implied contract to maintain FNY as a planned producer for MRE-7 and subsequent acquisitions.

FNY further argues that items (1)-(5) and (7) were done in bad faith by ACO Liebman, and so constituted breaches of contract.

Progress Payments

(Claim Items (1), (2), (3), (4))

Failure to make progress payments is a breach of contract. See Pilcher, Livingston & Wallace, Inc., ASBCA No. 13391, 70-1 BCA ¶ 8331 at 38,765; R.J.H. Corp., ASBCA No. 9922, 66-1 BCA ¶ 5625 at 26,278-79 (delay in initiating progress payments due to erroneous assumption that completion and acceptance of preproduction sample were conditions precedent to making of progress payments). ACO Liebman refused to authorize FII's first three PPRs on the erroneous assumptions that G&A and manufacturing overhead costs unaccompanied by direct costs were not

payable, and the MRE-5 supply contract required physical progress, rather than incurrence of costs, and suspended progress payments from 6 February to 6 May 1985. FNY received no progress payments from 16 (or 29) November 1984 until 6 May 1985. (Findings 7, 18, 23- 24, 26, 28-31, 33, 40, 51-52) ACO Liebman did not authorize FNY's PPR Nos. 5-7 from 5 July until 11 October 1985 and suspended progress payments from 23 August to 11 October 1985 on the erroneous assumption that FNY's accounting system was inadequate to cumulate and support costs of progress payments (findings 61, 63, 67, 71). Respondent should have made payment on the first PPR in each period no later than 10 December 1984 and 15 July 1985 (for the reasons explained infra). We hold that such denials, suspensions and delays in making progress payments were breaches of the contract.

FNY contends that respondent was required to pay progress payments within 5 to 10 days after their submission, citing a 4 January 1983 OSD memorandum excerpted in Defense Acquisition Circular No. 76-42. FNY's MRE-5 contract did not include or refer to such OSD memorandum. Absent a contractual or statutory time limit, progress payments are required to be paid within a reasonable time after submission. We believe that the DAC 76-42 payment guideline of 5-10 days is a reasonable standard. Respondent paid all FNY's PPRs except No. 4 and No. 22 (which was not paid at all) more than 10 days after submission for a total of 317 non-concurrent days of progress payment delinquencies, but with no proven impact upon performance of the contract (finding 111). We hold that such delays in payment of approved progress payments did not result in any additional compensable delay.

From FNY's PPR No. 8 ACO Liebman deducted $400,000 for the purportedly "actual" payment FNY

received for sale of the purchase option on the leased premises, as a "rental income credit" pursuant to the 21 August 1985 Penzer-H. T. Food-Pilot Realty settlement agreement (finding 72). The $400,000 was corrected to $374,180 in January 1986 (findings 82, 111). That August 1985 settlement agreement provided that H. T. Food was authorized to keep the $400,000 as accrued, unpaid rent, and Mr. Penzer was not sure whether he gave FII a check or a credit (finding 62). We hold that the ACO's $400,000 or $374,120 deduction from PPR No. 8 for the rental credit was proper.

ACO Liebman deducted $59,664.29 from FNY's PPR No. 13 on 18 March 1986 by mistaken application of a "percentage of physical progress" factor prescribed for construction and shipbuilding contracts, but not supply contracts (findings 71, 73, 84), and also withheld from other PPRs $399,111 in costs for office automation, production equipment and other normally capitalized costs, but which the parties agreed at the outset were direct costs without need for capitalization and depreciation, from submission of PPR No. 1 on 16 April 1985 until the $399,111 was paid on 13 June 1986 (findings 18, 23, 50, 52- 55, 95). We hold that the foregoing invalid deductions were breaches of contract. See Pilcher, Livingston, R.J.H., supra.

On 18 March 1986, starting with PPR No. 13, when FNY's costs incurred plus estimated costs to complete first exceeded the contract price, ACO Liebman applied a "loss ratio" to all progress payments (findings 84, 111). At that time, ¶ (c)(v) of the DAR 7-104.35(b) PROGRESS PAYMENT clause authorized the CO to reduce or to suspend progress payments whenever he found upon substantial evidence that the contractor "has so failed to make progress that the unliquidated progress payments exceed the fair value of the work accomplished on the

undelivered portion of this contract" (finding 7), and, in implementation of that ¶ (c)(v), DAR § E-524.5(b) provided--

> If it is determined that the total costs incurred plus the estimated additional costs to complete the contract will exceed the contract price, . . . all further progress payments will be adjusted using a loss ratio factor . . . . For the purpose of computing the loss ratio factor, a revised contract price will be used consisting of the current contract price . . . plus unpriced contract actions, such as change orders . . . , ***to the extent obligated***. The revised contract price divided by the sum of the total costs incurred to date . . . plus the estimated additional costs to complete . . . will be the loss ratio factor. [Emphasis added.]

On 20 or 21 March 1986, FNY submitted a "draft" $3.4 million claim, whose allegations are not known, because the document is not in the record (finding 85). On 24 April 1986, FNY submitted a certified, $5,709,560 claim alleging failure to make full and prompt progress payments, interference with contract performance, requiring excess performance and improper withholdings from progress payments (finding 88), the same constructive changes and breaches as in the May 1991 claim, subject of this appeal (finding 121). None of those claims were "unpriced contract actions, such as change orders," and certainly no such claim obligated any funding at that time, within DAR § E-524.5(b). We hold that the ACO's deductions due to his "modified loss ratio" were not an abuse of discretion at that time, and were not a breach of contract.

FNY also alleged delay due to an unnecessary

novation agreement. However, such delay was concurrent with the foregoing progress payment delays.

Government Interference

(Claim Item (5))

Starting in December 1984, ACO Liebman provided inaccurate information about the requirements for incurrence of costs and physical progress under the contract's progress payment clause, and refused to confirm the proper terms of that clause, to FII's prospective sources of contract financing: DDD, Broadway Bank, Richard Penzer, William Robbins, AT&T and PFS. The results of the ACO's conduct were to deter or delay those prospective sources from financing FII, and to cause FII to put building repairs and renovations on hold, to lose its financing opportunity for state-of-the-art building management and control system hardware and software, and instead to purchase less efficient equipment for that purpose. (Findings 29, 35-39, 43, 45, 54)

ACO Liebman's foregoing interferences with prospective financers - conjoined with his aforesaid failure to initiate progress payments - delayed physical progress from 15 November 1984, when the contract was awarded (finding 22), until 11 February 1985, when FNY arranged contract financing from PFS and BLA (finding 41), except for building repairs and renovations, and first article completion and approval on 16 January 1985 (finding 38). We hold that such interference with FNY's securing of contract financing was a breach of contract. See George A. Fuller Co. v. United States, 69 F. Supp. 409, 411, 108 Ct. Cl. 70, 95 (1947) (the implied duty of non-interference is that neither party to the contract will do anything to prevent performance thereof by the other party or will hinder or delay him in its performance; interference is a breach of contract).

In summary, after contract award, ACO Liebman's repeated interferences with FNY's prospective financiers and his refusal to approve progress payments to FNY until 6 May 1985 delayed FII's commencement of performance by 172 days and his erroneous refusal to authorize payment of PPRs Nos. 5-7, and suspension of progress payments from 15 July to 11 October 1985 further delayed FNY's performance by 88 additional days. The record contains no evidence that FII/FNY caused any delay in physical progress on the contract during that period. (Finding 129)

Government Diversion of CFM

(Claim Item (6))

FNY directed Sterling Bakery, a supplier of CFM brownies, to "ship-in-place" FNY's order. On about 7 January 1986, DPSC countermanded FNY's direction and ordered Sterling to divert those CFM components from FNY to RAFCO to support the reprocured MRE-5 units. That diversion led to a brownie outage on 30 January 1986 and halted FNY production for 11 days. (Finding 78) Contract § H- 5, Government Furnished Property, ¶ h, gave the Government the authority to direct the substitution of any of the specified GFP components of the MREs (finding 8). But DPSC had no authority to direct a CFM supplier of FNY to provide such CFM to another prime contractor. The convenience termination settlement agreement provided that FNY was entitled to $193,727 as settlement of its $387,455 claim for CFM "seized" by respondent (finding 78). We hold that respondent is also liable for the 11- day delay in FNY's production at the end of January 1986 (finding 130), as a breach of contract.

Unauthorized Liquidation of Progress Payments

(Claim Item (7))

In FNY's MRE-5 contract, the DAR 7-104.35(b) PROGRESS PAYMENT clause prescribed a 95% progress payment liquidation rate, and authorized an increased liquidation rate under any of the six conditions set forth in ¶ (c) (finding 7). On or about 29 October 1986, ACO Liebman ordered liquidation of FNY's progress payments at 100% citing FNY's "serious financial difficulties" and cessation of production (finding 113). Respondent recouped the invoiced amounts on 24 of FNY's invoices, totaling $1,455,119, at a 100% progress payment liquidation rate (finding 122). We hold that respondent properly liquidated, at the 95% rate, the amounts in four FNY invoices against previously unliquidated progress payments, and respondent's recoupment of progress payments at the 100% rate was authorized by ¶ (c)(ii) of the Progress Payment clause, "has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract."

Failure to Pay Invoices For Supplies Delivered

(Claim Item (8))

FNY's 1 May 1991 claim for $21,959,311 included failure to pay for product accepted (finding 121). On 29 April 1997, FNY notified respondent that it had not paid 33 invoices totaling $1,907,979.05 for MREs delivered and accepted (finding 122). FNY's 18 May 1998 More Definite Statement of its ASBCA No. 43965 complaint included, in ¶ 47, non-payment of 34 DD 250 invoices for $1,907,979.05, as a "material breach of contract." In September 1999, FNY submitted a claim to the CO alleging that respondent had not

paid a net $95,398.95 for 34 invoices for MREs delivered under the captioned contract, and in October 1999 took an appeal from the deemed denial thereof (ASBCA No. 52438) We dismissed ASBCA No. 52438 on the basis that the $95,398.95 sought therein duplicated that same amount sought in ASBCA No. 43965. Freedom NY, Inc., ASBCA No. 52438, 00-1 BCA ¶ 30,873 at 152,432. FNY moved for summary judgment on its right to $95,398.95 on the 34 invoices. Respondent argued that whether it had paid those 34 invoices was a disputed material fact. We deferred ruling on that motion until deciding the merits of this appeal.

Modification No. A00004 resolved FNY's entitlement to payment of $246,947 for the five unpaid invoices (finding 122). We hold that FNY is entitled to that $246,947 already paid, and no more.

GFM Delays

(Claim Item (9))

Paragraph (a) of the DAR 7-104.24(a) GOVERNMENT PROPERTY clause of the MRE-5 contract (finding 7) provided that in the event the Government did not deliver the specified GFM to the contractor by the time stated in the schedule, viz., § H-5 of the MRE-5 contract, then the contractor is entitled to an equitable adjustment of the contract price and delivery dates affected by such delay. Respondent delayed delivery of GFM for 40 days in September-November 1986. FNY notified respondent of the GFM outages. Such GFM delays resulted in closure of FNY's production line for 40 days, and release of some of its production workers. (Findings 102, 105, 110, 112-13, 130) Moreover, respondent's non- delivery of GFM to FNY from 29 November 1986 to 8 May 1987 (finding 131) caused that 160-day delay in resuming and continuing contract

performance. We hold that FNY is entitled to recover the costs of such 40 and 160-day extensions under DAR 7-104.24(a), ¶ (a).

Improper Inspection

(Claim Item (10))

FII's approved Inspection Plan for MRE-5 assembly included (1) "Moving Lot Sampling/Inspection," for Government verification inspection for normal production of all end items, in which the point of sample selection and inspection for final assembly cases was after strapping and final marking of cases, but before their "palletization," and (2) only in the event of rejection, rework or reinspection of lots, "Stationary Lot Sampling/ Inspection" after palletization (finding 46). The Government inspectors (AVI) improperly performed "Stationary Lot Sampling/Inspection" for about two weeks in October 1985. In November-December 1985 AVI changed to the "Moving Lot Sampling/Inspection" and trained its inspectors to identify valid defects, indicative that it had notice of its improper procedures. The result of AVI's corrective actions was that AVI's rejection rate decreased markedly by 19 December 1985. (Findings 74-75)

Inspection performed in accordance with the inspection plan upon which the parties agreed at the outset of contract performance is proper, and does not constitute a constructive change. See Max Bauer Meat Packer, Inc. v. United States, 458 F.2d 88, 91 (Ct. Cl. 1972). We hold that respondent's imposition of improper inspection procedures was a constructive change. See Astro Dynamics, Inc., ASBCA No. 28381, 88-3 BCA ¶ 20,832 (imposition of inspection procedure different from and more stringent than contract specified was constructive change).

Added Zyglo Test Requirement

(Claim Item (11))

The Government issued two change orders, by unilateral Modification Nos. P00024 and P00028 in May and June 1986, that added new requirements for FNY to inspect 200 pouch samples for "micro-holes" and to send 50 such samples to AVI for "Zyglo" florescent dye testing. FNY visually inspected for micro-holes for six to eight months, thereby increasing production time. (Finding 90) Such testing was a claim reserved from the releases in Modification Nos. P00025 and P00029 (findings 95, 107) and appellant is entitled to an equitable adjustment for it.

Loss of Post-MRE-5 Contracts

(Claim Item (12))

FNY argues that DLA/DPSC breached the MRE-5 contract by declining to award subsequent MRE contracts to FNY, an IPP planned producer, and instead awarding such contracts to CINPAC, after 1986. FNY argues that DPSC's failure to award MRE-7 and following MRE contracts to FNY is governed by United Technologies Corp., Pratt & Whitney Group, ASBCA Nos. 46880 et al., 97-1 BCA ¶ 28,818. There, the engine contract's § H-24, "Investment Incentives," provided that the Navy had determined it in the national interest and industrial mobilization to have two F404 aircraft engine manufacturers, and it intended to award at least 30 percent of the total annual F404 engine production requirements over the following five fiscal years to Pratt & Whitney, provided the Congress appropriated funds therefor and four other conditions, all of which the contractor and the Government met. The Board held that failure to award such F404 contracts to Pratt & Whitney was a breach of contract.

97-1 BCA at 143,763, 143,804. By contrast, in Defense Systems Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991, modified on motion for recon., 01-1 BCA ¶ 31,152, cited by appellant, the Board held that the award of a rocket fin replacement contract to the system contractor's competitor was not a breach of contract, since the system contractor had no separate contract for such rocket fins, and it did not automatically become a fin mobilization producer by virtue of award of its rocket system contract. 00-2 BCA at 152,998-99.

The MRE-5 contract had no provision stating DPSC's intent to award future MRE contracts to FNY. FNY's IPP agreement did not bind DLA or DPSC to any contractual relationship or obligate the Government to contract with FNY (finding 3). Although several MRE procurement justifications and solicitations provided for soliciting offers and negotiating with three or four IPP planned producers, DPSC from time to time made MRE contract awards to fewer than the number of IPP planned producers that submitted offers (findings 4, 104, 117, 119). We conclude that designating FNY as an IPP planned producer was not a Government commitment or guarantee that it would maintain FNY in such status or continue to award MRE contracts to FNY. We hold that DPSC's failure to award FNY MRE-7 and subsequent ME contracts was not a breach of any express or implied contract term or condition to maintain FNY as an IPP planned producer.

Remote or speculative damages such as general loss of business or loss of potential contracts are, as a matter of law, not recoverable. See Defense Systems Co., 00-2 BCA at 152,965, citing William Green Const. Co. v. United States, 477 F.2d 930, 936, 201 Ct. Cl. 616, 626 (1973), cert. den., 417 U.S. 909 (1974) (damages such as general loss of business and loss of entire net worth considered too remote

and consequential to be recovered). The Board cannot order respondent to reinstate FNY as a planned producer of MREs, because we have no jurisdiction or authority to grant the relief of specific performance. See Alsace Industrial, Inc., ASBCA No. 51709, 99-1 BCA ¶ 30,227 at 149,543 (and authorities cited therein).

Summary of Entitlement

We hold that (a) respondent breached the MRE-5 contract with respect to FNY's claim item Nos. (1), (3) (except for the rental credit and loss ratio deductions), (4), (5), (6) (which was resolved in Modification No. A00004 other than as to delay), and (8) (which was resolved in Modification No. A00004 for $246,947); (b) respondent's actions constituted constructive changes or were compensable under the Government Property clause, with respect to FNY claim item Nos. (9), (10) and (11); and (c) there was no breach or compensable change proven with respect to FNY's claim item Nos. (2), (3) (rental credit and loss ratio deductions), (7) and (12).

IV.

AFFIRMATIVE DEFENSES

We next address whether FNY's 1 May 1991 claim is barred, in whole or in part, by accord and satisfaction by Modification Nos. P00011, P00018 or P00020, or by the release provisions in contract Modification Nos. P00025, P00028 or P00029.

Modification Nos. P00011 and P00018. These modifications extended the MRE contract deliveries by three months on 14 June 1985 and by 60 days in November 1985, each for "consideration" of a $100,000 price reduction

(findings 56, 70). On 29 May 1986, Modification No. P00025 rescinded those $100,000 price reductions (finding 95). We interpret the reinstatement of the two $100,000 considerations to the MRE contract price as tacit admission that the delivery extensions in Modification Nos. P00011 and P00018 were not for contractor-caused delays. We hold that those modifications did not constitute an accord and satisfaction with respect to any prior FNY claims, for lack of consideration, a necessary element of accord and satisfaction. See Brock & Blevins Co., Inc. v. United States, 343 F.2d 951, 955, 170 Ct. Cl. 52, 58-59 (1965) (the essential elements of an effective accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration).

Modification No. P00020. This modification extended the MRE contract delivery schedule by 60 days, provided for discretionary reinstatement of the disputed 114,758 MRE-5 cases terminated for default, and adjusted the § L-4 progress payment limitation (finding 81). Modification No. P00020 embodied the parties' 9 December 1985 agreements (finding 79). On 9 December 1985, the parties orally agreed to the terms later set forth in Modification No. P00020, but additionally on that date the Government requested FNY to release all its prior claims, and FNY rejected that request and refused to release all prior claims (finding 77). Respondent's review and consideration of FNY's March 1986 $3.4 million claim (finding 85) and the parties' discussions and negotiations to resolve that claim (findings 86, 89, 91-93), are indicative that they did not consider Modification No. P00020 to constitute an abandonment or an accord and satisfaction of FNY's prior claims. Given this history of the parties' communications and negotiations prior to and after its execution, we hold that Modification No. P00020 was not an accord and satisfaction of FNY's prior claims because there was no meeting of the

minds with respect to releasing such claims, and such a meeting of the minds was a necessary element of accord and satisfaction. See Brock & Blevins, supra; Teledyne Lewisburg v. United States, 699 F.2d 1336, 1361-62 (Fed. Cir. 1983) (modification executed after contractor refused to sign a release of claims was not an accord and satisfaction).

Modification No. P00025 dated 29 May 1986. Paragraph 5 of Modification No. P00025 released all prior FNY claims except with respect to CFM manufactured by Star Food, stated that the parties' terms and conditions were integrated therein, and the modification was entered into free from duress or coercion (finding 95). FNY argues that ¶ 5 does not bar any part of its claim because: (1) without the 13 May 1986 "side agreement" with DLA, FNY would not have signed P00025; (2) each provision in P00025 benefiting FNY - reinstating the terminated 114,758 cases, schedule extension on account of Government delays, the $399,111 capital equipment payment, the $200,000 price increase due to the invalid $100,000 consideration in Modification Nos. P00011 and P00018 - was required by the contract before 29 May 1986, and so was not "new" consideration for release of FNY's $3.4 million claim; (3) respondent failed to process a $2.7 million FNY "V- loan" and to negotiate in good faith a fair and reasonable MRE-7 contract with FNY, as agreed in the "side agreement"; (4) FNY signed Modification No. P00025 under duress; (5) enforcement of Modification No. P00025 would be unconscionable because DLA and DPSC misled FNY to sign Modification No. P00025 with the understanding that DLA had approved the "side agreement"; and (6) the "side agreement" was induced by fraud, since DLA knew, or should have known, but did not disclose to FNY, that V-loans were discontinued before May 1986.

We have found that, but for the DLA 13 May 1986 "side agreement," FNY would not have signed Modification

No. P00025 (finding 93). PCO Bankoff's testimony that he said there was no side agreement on 29 May 1986 was not probative (finding 94). To the extent that DLA disagreed with the MRE-7 negotiations and 8(a) awards elements of that side agreement (finding 91), DLA did not notify FNY of any disagreement until 30 May 1986 (finding 96). The Defense Department did not support the $2.7 million guaranteed loan for FNY, and no guaranteed loan was made to FNY (finding 101). DPSC did not negotiate an MRE-7 contract with FNY despite the favorable 24 September 1986 pre-award survey, and DLA did not initiate any 8(a) contract with SBA for FNY. (Findings 103, 117)

The Government's delayed payment of an amount less than specified in an agreement to settle contract claims was a breach of contract. See Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 224 Ct. Cl. 111, 138 (1980) ("the Government cannot enforce the benefits of the settlement agreement against the contractor, and, at the same time, vary its own obligations thereunder."). We hold that respondent cannot enforce the Modification No. P00025 release provision, since it did not fulfill its duties under the side agreement thereto. Accordingly, we do not decide the other grounds of lack of new consideration, duress, unconscionability or fraud.

Modification No. P00028. Modification No. P00028, on 7 August 1986, gave FNY an eight-day schedule extension and released FNY's claims resulting from lack of GFM jellies during the period 16-28 July 1986 (finding 100). Thus, any part of FNY's May 1991 claim seeking costs caused by the foregoing lack of GFM jellies was barred by Modification No. P00028.

Modification No. P00029. Modification No. P00029, executed on 7 October 1986, recited that FNY's

"delinquency or anticipated delinquency may be the responsibility" of FNY, gave FNY a delivery schedule extension for a $100 price reduction, released all FNY's prior claims except for claims relating to Zyglo testing or "monies due or to become due as payment for product delivered to and accepted by the Government," and stated that it was an integrated document with no collateral agreements, understandings or reservations (finding 107).

FNY argues, principally, that the Modification No. P00029 release does not bar its claims because (1) Modification No. P00029 reserved FNY's claim for "monies due or to become due as payment for product delivered to and accepted by the Government," which payment is subject to Changes clause adjustments; and (2) FNY signed Modification No. P00029 under economic duress, namely, improper withholding of PPR No. 21 well knowing of FNY's immanent financial collapse due to respondent's antecedent maladministration of the contract.

The ACO had been deducting loss ratio factor amounts from FNY's progress payments since March 1986 (finding 84). In early October 1986, the PCO knew of FNY's claims of financial hardship on account of delayed and withheld progress payments, and of the September 1986 GFM outages that had delayed and shut down production (findings 85, 88, 102-03, 106). The PCO and ACO well knew of FNY's financial distress (finding 106). On 3 October 1986, after the ACO had approved FNY's PPR No. 21 for payment of $700,000, the PCO told the ACO to withhold such payment until FNY signed Modification No. P00029. PCO Bankoff's 7 October 1986 letter to FNY advised that upon executing Modification No. P00029 the $721,887 balance would be paid against PPRs. (Finding 106)

The elements of proof of duress are that (1) one party

involuntarily accepted the terms of another; (2) the circumstances permitted no other alternative; and (3) such circumstances were the result of coercive acts of the other party. See Fruhauf Southwest Garment Co. v. United States, 111 F. Supp. 945, 126 Ct. Cl. 51, 62 (1953). The DAR 7-104.35(b) PROGRESS PAYMENT clause in FNY's contract gave the contracting officer no right to withhold an approved progress payment until the contractor signed a contract modification. Since the PCO and ACO were both well aware of the contractor's financial distress immediately prior to execution of Modification No. P00029, we are persuaded that their delaying payment on the previously approved PPR No. 21 coerced FNY to sign Modification No. P00029. FNY's duress resulted not from its financial necessities, but rather from the Government's coercive act. Cf. Progressive Bros. Const. Co. Inc. v. United States, 16 Cl. Ct. 549, 554 (1989) (financial stress without Government coercion was not duress).

We hold that the general release provision in Modification No. P00029 is not enforceable because the extended delivery dates provided in Modification No. P00029 did not result from delays for which FNY was responsible, but rather for delays for which DPSC was responsible (findings 102, 105), and on account of duress.

We have considered the Government's other affirmative defenses and find them meritless.

V.

QUANTUM

We held that ACO Liebman's interferences with FNY's prospective financers and refusal to authorize progress payments delaying commencement of performance

by 147 days; his erroneous refusal to authorize PPRs Nos. 5-7 delaying performance for 88 additional days (finding 129); respondent's diversion of FNY's CFM resulting in an 11-day delay (finding 130); and the ACO's unauthorized deductions from progress payments, were breaches of contract (claim items (1), (3, partly), (4), (5), (6)). However, the MRE-5 contract incorporated the DAR 7-104.77(f) GOVERNMENT DELAY OF WORK clause (finding 7), which provides a remedy for Government delay. The clause includes delay "by an act of the Contracting Officer in the administration of this contract, which act is not expressly or impliedly authorized by this contract." A contractor cannot maintain a breach claim for Government delay when relief is available under the contract. See Triax Pacific, A Joint Venture, ASBCA No. 36353, 91- 2 BCA ¶ 23,724 at 118,747, aff'd, 958 F.2d 351, 354 (Fed. Cir. 1992) (delay in issuing notice to proceed was not a breach because remediable under the contract's "Suspension" clause); Mega Const. Co., Inc. v. United States, 29 Fed. Cl. 396, 415 (1993) (default termination was not a breach because it was subject to equitable adjustment under the convenience termination clause). Accordingly, the foregoing Government interferences, delayed and withheld progress payments, and diversion of CFM were remediable by adjustment to the contact price under the MRE-5 contract's DAR 7-104.77 clause, under which no profit is recoverable.

We also held that FNY was entitled to an equitable adjustment under the GOVERNMENT PROPERTY clause for delays attributable to late delivery of GFM (claim item (9)).

The costs relating to the $59,664.29 improper progress payment deduction (claim item (3)) are encompassed in the "estimated cost at completion" in the convenience termination settlement agreement, and will

become payable upon recomputation of the "loss ratio" utilized therein based upon our holding in this appeal. The TCO has paid the five unpaid invoices (claim item (8)) in the convenience termination settlement. We held that FNY established entitlement on its claims (10) and (11), but we found that record evidence did not show the time or cost effects of the Government's conduct sufficient to establish monetary recovery for such items (finding 133).

Based on those holdings, the record evidence substantiates recovery of the following adjustments to the contract price:

Claim Item(s)	Amount	Finding
(1), (4), and (5), delay of 235 days due to withheld and suspended progress payments, interferences with prospective financers	$2,738,206	129
(6) 11-day delay due to diversion of CFM	$ 198,501	130
Subtotal:	$2,936,707	
(9) GFM delay of 40 days	$ 721,821	130
(9) GFM delay of 160 days	$1,864,310	131
Subtotal:	$2,586,131	
Profit at 14.88% on $2,586,131	$ 384,816	
Subtotal:	$2,970,947	
Total recovery:	$5,907,654	

In summary, we hold that FNY is entitled to a contract price adjustment under the GOVERNMENT DELAY OF WORK and GOVERNMENT PROPERTY clauses of $5,907,654, plus CDA interest on such amount, from 6 May 1991, when we deem that the PCO received FNY's 1 May 1991 certified claim, until the date of payment.

We sustain the appeal to the extent set forth above, and deny the balance thereof.

Dated: 28 August 2001

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 43965, Appeal of Freedom NY, Inc., rendered in conformance with the Board's Charter.

Dated: 5 Sep 2001

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX D

EXCERPT FROM TESTIMONY OF HENRY THOMAS
MAY 17, 2000
TRANSCRIPT 642-652

Q Now, I'd like to talk about the execution of the modification. And how it came about. The modification was presented to you, given to you, I take it. What happened? And again, as distinctly as you can. What happened.

A I was told by Dave Lambert that he had reached an agreement with Kiasa. I had sent this. He asked me to change the name of the recipient of this letter from Frank Bankoff to Ray Kiasa. At the bequest of Mr. Apellean who was Frank Bankoff's attorney. And that they had agreed to this. Bankoff had agreed to that and that was what I was to do.

Q Are you saying the original version of this letter was addressed to Mr. Bankoff?

A Yes. It was addressed to Bankoff. But since Bankoff had referred the whole thing up the DLA headquarters for resolution, then Mr. Apellean says, that this was negotiated by the highest person at DLA in Contracting who had authority to do something here, was Ray Kiasa, the Executive Director of Contracts. That this document should be attached to the modification and then handed to the PCO as one document.

Q Go on, please.

A So what we did was, I was to go to Philadelphia and attach this. And this cover letter says that the settlement if reflected in part in the contract modification which is attached. And it was, in fact, attached to this document. And the terms and conditions have been agreed to by Freedom and DPSC. So what I did was, I went to Philadelphia Colonel Frank Francois.

Q Who is he?

A Colonel Francois is a former colonel in the United States Army off of the Joint Chiefs of Staff.

Q And how is he related to this deal?

A Well, he was at this time one of my consultants. And he – him and I had visited with Norma Lefwich down at the Office of Secretary of Defense at the Pentagon at the time. And briefed her on what we were doing and how we were going to do it. And we gave Norma the – and told her that we were going to go there and sign this and this is what our understanding were.

I traveled to Philadelphia on May 29. I met Colonel Francois at Philadelphia. We proceeded up to a DPSC conference – to a little room where Frank Bankoff told us to go once we got there and the three of us went inside. What I did was I had a letter that I had printed out the day before, dated May 28. And I proceeded to attach that to the modification before I signed it. And Frank said to me, "That's the wrong letter. It's got the wrong date on it." So he pulled out a version of his which happens to have had on page 3, LABS, Nadig, that he wrote in there and –

Q This version here?

A Yes. This is what he pulled out of his bag when he told me I had the wrong letter. In other words, he said I got the wrong date on it. That's not what was agreed to – Kiasa and them. So I said, "Okay." And I just told him that I had printed it out the day before. My computer is on of the Word Stars that we buried the date in there and it uses the system date every time you open it. So if we open this letter a month from now, June 25 the date is going to change to that date. So every time you open the letter, the date changes. So that's what happened and that's the reason why it had a different date on it. So I sat that letter aside, grabbed his letter, and told Frank Bankoff that I'm going to sign this document, I'm attaching it to – and this is my understanding of the document. And what he did is was say, "Okay, fine. I'm going to take this and send it off to Mr. Kiasa." Which – after I then signed it after I attached it. And gave it to him. What he did was he left the room. He went and as I later understand it, he did fax it to Mr. Kiasa, and when he returned he signed it, and gave me my copy and we left.

Q How do you know he faxed it to Mr. Kiasa?

A The document at M-25 is a – when we deposed Mr. Kiasa, I guess, this is where it came from. It also has a fax legend across the top. It's not in this one. It might be in another one. But there – if it says note, date, and time. If you look at the first page of M-25, you see it says, note, date, and time. It's pointing up to the fax legend. It just didn't come out clear in this copy. But there is a fax legend that shows the date and the time that this was faxed and that this document is a faxed cover sheet from the Defense personnel support center to Mr. Apellean to Director, DLA headquarters, attention, Ed Neal. And they said –

Q When he came back to the room – when he came back, I'm a little confused. What did he do then? Did he sign the mod? What did he do?

A He came back and said, "Okay." And signed it. So if you read what it says, I said I wanted confirmation. I wanted in good faith to confirm these commitments based on both parties in good faith. When he came back and said, "Okay." I figures that Mr. Kiasa had told him, "Okay." And in good faith he signed it, too. And that confirms it. So I've got a deal here. That's what the whole – that says, "If Freedom wishes to confirm those commitments based on both parties in good faith and in a timely manner to take the respective actions and do the following." And one of them was that they would negotiate a fair and reasonable contract with Freedom.

Q Thank you.

JUDGE JAMES: If I'm following what you said, Mr. Thomas. In Philadelphia, you and Mr. Bankoff both signed the mod itself on May 29, 1986. Is that correct?

THE WITNESS: That's right.

JUDGE JAMES: Now, did you do that the minute you signed this cover letter?

THE WITNESS: No. The cover letter was already signed and agreed to with Mr. Kiasa on the 13th. And I had a copy of it and I was to take this cover letter of understanding that we reached with Mr. Kiasa, attach it to the modification, and give it Mr. Bankoff. And that's what I did.

JUDGE JAMES: I heard that. There's some – how's there discrepancy in the letter that Mr. Bankoff objected to. Is that right?

THE WITNESS: No.

JUDGE JAMES: On the third page, something to do with labs.

THE WITNESS: No. No. He didn't object to that. What that is – is that this is Colonel Francois' handwriting, LABS, he was saying it says, From Nadig, and he just writes LABS on it.

JUDGE JAMES: When?

THE WITNESS: That was on this copy.

JUDGE JAMES: When?

THE WITNESS: When he gave it to me.

JUDGE JAMES: On the 29?

THE WITNESS: Right. The words LABS is on there.

JUDGE JAMES: Okay. So the letter itself is May 13. You signed it on the 13?

THE WITNESS: Yes. I signed it on the 13.

JUDGE JAMES: And then somebody else wrote in LABS on the 29?

THE WITNESS: Right. Now they just wrote LABS in when he gave it to me. His copy already had LABS on it.

JUDGE JAMES: So you don't know when that was written then?

THE WITNESS: No.

JUDGE JAMES: You didn't write it.

THE WITNESS: No. I didn't write LABS.

JUDGE JAMES: Okay. Go ahead.

BY MR. STEIGER:

Q Was it your understanding when you signed the modification itself that the cover letter was part and partial of the deal?

A Yes. That's what Dave Lambert told me to do. He says, "You must attach this to the modification because it then becomes the document."

Q Did Mr. Bankoff indicate to you that it wasn't?

A No. He did not.

Q Did he say anything to you concerning the cover letter?

A No. He didn't say anything. He didn't say – he just accepted it. He grabbed it and says, "Okay. Fine. I'm going to have to take it and fax it off to Mr. Kiasa."

Q Before you handed him the document, did you have any discussion with Mr. Francois concerning the document?

A Yes. There was some discussion that I recall that Francois said. He says that if I didn't think – some words to this effect, I can't put – remember exactly. He says, "If you don't think that this document put together equals the understanding..." It had something to do that – I had to put it together the same way as Lambert had said. So that's why I had to put it together first and present to Frank as one package. I forgot what he was saying.

Q Regarding your understanding of the cover letter and the modification itself, are you – did the Government know before the modification was signed what your understanding was?

A Yes.

Q Well, how do you know that?

A Because this letter was given to Mr. Kiasa on May 13 and that's before the 29. No one objected. Nobody sent me anything. Nobody called me. Nobody said anything. I then took this letter as was my understanding that this was already pre-approved by Mr. Capellean – Apellean which Frank Bankoff's lawyer, okay. And there is correspondence in the file that's going back between Kiasa, Lambert, and Bob Apellean. So Frank Bankoff's attorney, Mr. Apellean, is in step with this. He didn't object to this either. Because he took the thing and he actually, based on this cover letter, he's the one that faxed it down to DLA headquarters.

Q And is it your understanding, Mr. Thomas, that all the parties that you were dealing with knew that a 2.7

million-dollar loan was required to enable you to complete the contract?

A Absolutely. If you look at paragraph two, it talks about that the process of this loan guarantee –

Q I know but I asked you, if the Government was aware of it and how you know they were.

A Yes. We had discussed how we were going to get to the back end of this contract because they were going to process at 2.7 million dollar loan for Bankers in order for us to have necessary cash flow for the performance of this contract. For the completion of the contract. Through 31 October '86. And it spelled out what the cost was. Direct labor, raw materials, G&A, depreciation, and any other allowable costs in excess of the contract price.

Q Mr. Thomas, did you rely on the actions, good faith commitment, so whatever you want to call them in the May 13 cover letter? Did you rely on that with respect with your signing of the modification?

A Yes. I did.

Q Would, you of signed this modification had this cover letter not bee there and part of it?

A Now. I would not have. And I wouldn't sign –

Q And why not?

A Because if this was not part of the understanding, this is what I reached with Randy for him to continue financing in May. Otherwise, he could have stopped. That the Government had agreed to process a guaranteed loan. He

had agreed to give the loan to me. And all they had to do was process the other side of it. I wouldn't of signed this document if there was not an opportunity to sit down and negotiate, not bid, but negotiate face to face with a – for MRE-7. And when I said I wanted this in writing, they did put it in writing because what they did was the DLA headquarters, Mr. Kiasa, had Frank Bankoff issue a modification to the MRE-7 solicitation that says we're going to go from three to four. So now that I see there's four contractors, I in good faith – they did that in MRE-7. Now I'm saying, "Okay, fine. They now intend to sit down and negotiate a portion with me."

APPENDIX E

EXCERPT FROM TESTIMONY OF
COLONEL FRANK FRANCOIS
JUNE 1, 2000
TRANSCRIPT 2047-2050

JUDGE JAMES: Correct.

THE WITNESS: I'm Col. Ret. U.S. Army Frank Francois, F-r-a-n-c-o-i-s. My address is 5901 Mt. Eagle Drive, Apartment 1214, Alexandria, Virginia, My Zip Code is 22303-2511.

Whereupon,
COL. FRANK FRANCOIS,
A witness was called telephonically be counsel on behalf of the Appellant, and having been duly sworn by the Administrative Judge, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. LaCHANSKI:
Colonel, this is Bruce LaChanski. I wanted to ask you, did you accompany Henry Thomas to a meeting in Philadelphia on May 29th, 1986?

A Yes, I did.

Q And with whom did you meet in Philadelphia?

A We met with a contracting officer in Philadelphia in his office.

Q Do you remember his name?

A Yes I do.

Q Who was that?

A I just had a mental blank on his name.

Q Was it Frank Bankof?

A Frank Bankof, I'm sorry. That's right, Frank Bankof.

Q When you arrived and met him in his office, did you stay in his office?

A No. Henry Thomas and I, who had gone up to Philadelphia, then proceeded to a conference room.

Q Was David Lambert at that meeting with you and Henry Thomas and Mr. Bankof?

A Not at that meeting, no.

Q Was Walt Welsh at that meeting?

A No.

Q Was anyone other than you, Henry Thomas and Frank Bankof at that meeting?

A No, it was just the three of us.

Q During that meeting did Frank Bankof ever tell you to tear up a document?

A No, he did not.

Q Did Frank Bankof ever tell Henry Thomas not to sign any documents?

A No, he did not.

Q Now, at some point did Frank Bankof attach a cover letter to mod 25 and then leave the room?

A Yes, he did.

Q Did Frank Bankof say at that point what he was going to do with those documents?

A Yes, he did. He indicated he was going to send it to Washington for approval.

Q Did he say to whom specifically he was going to send it?

A Yes, he did.

Q Can you recall who that was?

A It was – a chief of the procurement section down there, and his name was – give me a mental –

Q Was it Ray Chiesa?

A Ray Chicsa, that's right.

Q When Mr. Bankof – what happened when Mr. Bankof came back into the room?

A He said that he had received approval and signed it, gave us a copy and we left.

MR. LaCHANSKI: That's all I have.

JUDGE JAMES: Ms. Hallam, if you want to cross examine the witness; Mr. Francois, the attorney that is coming to the microphone now is Kathleen Hallam of the Defense Department.

THE WITNESS: Okay.

CROSS EXAMINATION
BY MS. HALLAM:

Q Could you tell us what it was that Mr. Bankof had approval for?

A For to go ahead and sign the document at that time.

Q And what document was that?

A To my knowledge that was the mod.

Q Was there some other document other than the mod that you believe he was given approval for?

A Well, the other document was a cover letter that Mr. Thomas had signed addressed to Mr. Chiesa.

Q Is it your understanding that Mr. Bankof got approval to incorporate that cover letter into the modification?

A He didn't say that. What he said was, he had approval to sign the mod.

Q Is it your understanding that the cover letter was part of the modification agreement?

A At that time, that's correct.

Q And what did that cover letter incorporate into the modification, to your knowledge?

A Well, the cover letter was a summary of the information that had been discussed with Ray Chiesa and a Kabiesman, I believe his name was, the lawyer that was representing the government at that time, or not the government but BPSC, which is the government, and it was kind of memorializing those issues that had been discussed.

APPENDIX F

DEFENDANT'S DEPOSITION EXHIBIT
247-Chiesa
6-20-89

[Fax Line] MAY 29 '86 10:59 DPSC P

[*Handwritten Note:* "↗ *Note Date & Time*"]

FROM: Defense Personnel Support Center
Office of Counsel

R. Apelian

TO: Director
Defense Logistics Agency
ATTN: DLA-C
Office of Counsel

Ed. Neill
x 45964

No. of Pages 3

DLA TCC HIGH PRECEDENCE NOTIFICATION

NOTIFIED

NAME: ANN TIME: 1113

ACTION REQUESTED

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BRONX, NY 10462

(212) 822-7500 TWX 510 100 1911
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May 13, 1986

Mr. Raymond F. Chiesa
Executive Director of Contracts
Defense Logistics Agency, Room 4D231
Cameron Station
Alexandria, Virginia 22304-6100

Dear Mr. Chiesa:

Over the past several months Freedom, through its counsel David M. F. Lambert, Esq., Barnett & Alagia, Washington, D.C. and its consultant, Frank Francois, President, Potomac Marketing and Sales, Inc., Alexandria, Virginia, have been engaged in discussions with Defense Logistics Agency ("DLA") and its field activities, Defense Personnel Support Center (DPSC) and Defense Contract Administrative Services, New York, representatives to resolve a series of specific issues relating to Freedom's participation as a producer in the Individual Combat Rations, Meals-Ready-to Eat ("MRE") Program and the Industrial Preparedness Producer Program.

Those issues, in part, involved a dispute concerning Freedom's performance of DLA Contract DLA13H-85-C-0591 ("the Contract") for the production of 620,304 cases of MREs. By Modification to be designated (the Mod) P00021, Freedom and DLA under the authority of th [sic] Contract Disputes Act,

41 U.S.C. §601 *et seq.* have agreed to settle Freedom's claim against DLA for $8,401,768. That settlement is reflected in part in the Contract Modification which is attached. The terms and conditions of which have been agreed to by Freedom and DPSC.

During those settlement negotiations between Freedom's representatives and DLA, significant matters were discussed relating to Freedom's participation in the MRE Assembly Program. It was agreed that the understandings reached on those matters were not appropriate [*handwritten note: MRE appropriation*] for inclusion in [*handwritten:* "] the Mod [*handwritten:* "] but were more appropriately to be addressed in a separate letter. Freedom and DLA agreed to take certain administrative and other actions relating to the MRE Program. Freedom wishes to confirm those commitments based on both parties in good faith and in a timely manner taking their respective actions to do the following:

1. If Freedom is otherwise qualified, DPSC will negotiate a fair and reasonable contract with Freedom based on Freedom's existing mobilization capability and a specific cost/price qualifier for one of the four maximum share quantities of MRE VII production consistent with Freedom's approved monthly IPP quantity at M Plus 90. It is anticipated that the following table will be included in the MRE VII Assembly Solicitation:

MONTHLY ALLOCATED IPP QTY. AT M PLUS 90	MAXIMUM SHARE QUANTITY	PERCENT OF REQUIREMENTS
2,000,000 - Unlimited	2,182,132	41%
1,200,000 - 1,999,000	1,596,786	30%
850,000 - 1,199,999	904,786	17%
600,000 - 849,999	638,674	12%

2. As appropriate DPSC and DLA will process a request for a guaranteed loan to be submitted by Bankers Leasing Association, Northbrook, Illinois (hereinafter "The Lender") under the authority of 50 U.S.C. Appendix Section 2091, and the Related Federal Acquisition Regulations (41 C.F.R. §32.3), DOD Far Supplement (§32.302 *et seq.*) and other applicable regulations including financing defense contracts (32 C.F.R. §163.1 *et seq.*) and Federal Reserve Board Policies and Procedures (12 C.F.R. §245.1). The government loan guarantee to the Lender in an amount not greater than $2.7 million of costs for the purpose of ensuring Freedom the necessary cash flow for the performance of the Contract through completion on October 31, 1986. Costs shall mean direct labor, manufacturing overhead, G&A, depreciation, and other allocable and allowable costs which are in excess of the contract price of $17,197,828.

3. Provide all reasonable assistance to Freedom in obtaining traypack and pouch contracts through the Small Business Administration's 8(A) Program.

4 Provide technical and production assistance to Freedom to rework and reprocess as necessary approximately 46,000 MRE V cases presently being held by Freedom under AVI inspection and a medical hold. (Letter to be sent by Freedom requesting technical Rep. from Nadick). [*handwritten note: "Labs"]*

Although there were other matters discussed, the above represents resolution of the salient issues essential to Freedom's continued participation as a viable Mobilization Based government contractor.

It is important that the above understanding be confirmed as soon as practical.

Sincerely,

/s/ Henry Thomas

Henry Thomas
President

cc: Mr. Frank Bankoff, Contracting Officer
Ms. Norma Leftwich, The Pentagon, Washington, DC

APPENDIX G

EXCERPTS FROM TESTIMONY OF FRANK BANKOFF
MAY 23-24, 2000
TRANSCRIPT 1268-1271-, 1344-1348, 1384-1387

Transcript: 1268-1271

Q Did you ever see that side agreement in any form after that?

A Well, Henry tells me that, you know, I'm not that good with time. Certain things, I remember very well. And I remember that on the mod 25, it was a big signing. Freedom came in with a little contingent; Colonel Francois; Henry came in. I don't know if Dave Lambert –

Q Excuse me for interrupting. Is that the usual thing for a contractor to actually show up to sign a modification?

A No.

Q What is the usual practice for modifications?

A Contractor signs it; sends it back to me; I sign it; it's executed.

Q It's carried out through the mail?

A Usually.

Q Okay; continue; I'm sorry.

A But I remember: this was like a big deal. We were in the conference room; there were a number of people

there. I was there with my boss' boss, Walt Welsh, who was the branch chief of general products, and I remember there was a big to-do, and I was, you know, upset that it was one of those kids of things where, you know, standing up and forget it; we're not going to sign this contract, and it must have been around this so-called attachment that Henry's talking about.

Now, I don't remember Henry giving me this attachment, this so-called attachment that he says I faxed to Ray Chiesa. I certainly know I couldn't fax anything to Ray Chiesa, because I wouldn't know the guy's phone number or fax machine. You know, I don't talk to Ray Chiesa. He's the head of DLA; I'm a contracting officer at DSCP. Evidently, however, I do see in the record that the letter was faxed or the so-called side agreement was faxed by Bob Appellian. I don't know if Henry gave me the letter; I don't know if I refused to touch it, because I told Henry and Frank Francois before that I'm not privy to any side agreement; I'm not going to sign anything with a side agreement; you didn't talk to me; you didn't negotiate with me; I don't know what's being said. Chiesa doesn't talk to me.

And, you know, to me, it was a big deal, and it wasn't anything – the way Henry reflected it was not accurate. I didn't take something, walk out, come back in and simply sign a paper. I know I made a big deal about forgetting; walking out. And I think it was Colonel Francois that said okay, forget it; forget it; take it out, whatever; this is fine. And Henry signed the modification exactly the way it is, and we stressed that paragraph the said this is a discrete agreement. Everything is within this modification, because I have no idea, you know, what was discussed in DLA. Most of that stuff, I don't even know how to do. So, you know, how could I agree to it?

Q You said we stressed. Who was we?

A Myself, Walt Welsh; I mean, as far as I was concerned, it was my show. It's my contract modification, and I'm there to sign it with the contractor, and that was it. That was enough. And Walt, you know, certainly agreed with me. And, you know, I remember – I remember the room; I remember the table. You know, it's one of these things that I remember from my career. And, you know, Frank finally said okay, take it out. And he might have talked to Henry, and I don't know what Henry's exact words were, but Henry understood when I said that I wasn't signing this that I was signing only this modification, and there was no other side agreement with me.

Transcript: 1344-1348

BY MR. STEIGER:

Yesterday your testimony referred to something as a side agreement. Are you aware from your sitting as government's representative during the course of testimony that we have consistently referred to that as a cover letter?

A I'm sorry.

Q Yesterday you talked about a so-called, "side agreement," a letter dated, I believe, May 13, 1986, you agreed to it as a "side agreement."

Now sitting here listening to the testimony day after day, are you aware that we have been referring to the same letter as a cover letter?

A Okay.

Q Pardon?

A No. I was not aware it was always talked to me about a side agreement, but okay I'll call it –

Q You sat here for five days, you didn't hear it referred to as a cover letter?

A No. Okay.

Q Now you acknowledged that on that date that the modification number 25 was signed, May 29, I believe, 1986 – I'm sorry, you're shaking your head. Or are you just waiting for my question?

A I'm waiting for the question. I'm not familiar with the dates.

Q Okay. You acknowledged that on that date that the particular side letter was in fact, sent or faxed to Mr. Chiesa?

A I am now.

Q But you don't know how it got there?

A I didn't send it.

Q You didn't send it?

A No.

Q And do you recall that on the top of the letter when it shows the fax reference that it actually refers to May 20, that very day?

A I think I recall that.

Q Now, do you also recall being deposed by my co-counsel, Mr. Luchansky, at some time in the past regarding this case?

A Yes.

Q Do you recall during the course of your deposition regarding what happened on the date of the signing that you really had no recollection whatsoever of the details of what happened?

A No. I – there are certain things that I actually do see and do remember.

Q Now or –

A Always. Always.

Q Were these – what you do see and remember reflected in the deposition of the questions – of the answers that you gave Mr. Luchansky?

A If it was one of those vignettes that I remember, yes. I mean there are certain things I'm sure that I don't remember.

Q So in fact, you – during the deposition you were talking about a big show occurring with Mr. Welsh in the room –

A Right.

Q -- and all that at the time that the modification was signed?

A Right.

Q Mr. Bankoff, is it possible that you are confusing two distinct events. One that took place earlier, well before the signing of the modification and the event of the signing of the modification itself, on May 29. Is that possible?

A Is it possible? It's possible. But I don't believe so.

Q You don't believe so?

A No. Because I remember talking and – talking loudly with Frank Francois that we discussed this. We talked about this. There is no side agreement. There is no collateral agreement, and I don't think I would be discussing that on anything other than –

Q But you mentioned something about a Mr. Welsh being there and others?

A Yes.

Q And you're convinced that all that took place on May 29?

A Yes.

Q By the way, who is Mr. Welsh?

A He was the chief of the general products – General Food Products branch. In the scheme of things, I was the contracting officer in the MRE assemble, Margaret Rowles was the section chief of the operation ration section. She was my boss and Walsh was here boss.

Q Was it usual that they should be at a contract signing, signing of a contract modification?

A No, but it wasn't usual that Henry –

Q I asked you a question. Please answer it.

A No.

Q Do you know specifically why they were there?

A Probably because of all this –

Q I asked you if you knew specifically why they were there.

A I'm trying to answer.

Q No you start – you said probably.

A Well, because I believe.

Q Please answer the question.

A Probably because there was a lot of discussion. Well, two reasons. One, because this was a major issue as to whether or not we were going to continue the contract or not. Remember this is all around. Freedom is in for the most part, a default position and we are discussing extending the contract. So Mod-25 extends the contract.

But probably the real reason that they are there is because of this hoopla around these – this DLA negotiations and this so-called side agreement. And I think from the DPSC and, everybody wants to establish that we're not aware of a side agreement and this mod stands alone. And that's why our attorneys are there. That's why Welsh is there. That's why it was a big deal. To make sure there was not misunderstanding.

Transcript: 1384-1387

JUDGE JAMES: Okay. Now, getting up to 29 May at the so-called signing. What letter of Freedom, if any, did you see on that event?

THE WITNESS: I don't remember.

JUDGE JAMES: You don't know?

THE WITNESS: No.

JUDGE JAMES: But your testimony is that you told Mr. Francois to tear it up and not to – what did you tell him to do?

THE WITNESS: "It's not part of this modification Frank, we've discussed this. I'm not privy to a side agreement. I have nothing to do with it."

JUDGE JAMES: I understand all of that but what I'm trying to focus on is which letter you're telling him to disregard.

THE WITNESS: I think it was a letter similar to the May 2nd. In other words, the same – the same type of information. But I don't believe I read – I read the letter throughout, and I can't recall who it was addressed to. I just knew it was the same type of letter and –

JUDGE JAMES: So you don't know to whom it was addressed, you don't know what it said, and you don't know its date. Is that right?

THE WITNESS: Not right now. Not until you show it to me in the record.

JUDGE JAMES: Is it your understanding that back on 29 May 1986, you knew that information?

THE WTINESS: Did I know that there was some, yes.

JUDGE JAMES: But you've forgotten since then. Is that the idea?

THE WITNESS: No. I knew there was a document. I knew there was some kind of attachment or there was some kind of so-called – the provisions of a so-called, side agreement, in Freedom's opinion. They tried to put back into the mod and that's when I said, you know, "Forget it. There is no side agreement. There is no attachment to the mod. The mod is there." Now what that letter was, what that attachment was , exactly what the date of it, exactly who it was addressed to – I don't recall. It was the – it was the intent of what they were trying to do when I specifically said the days before, that there is no side agreement that the mod is in and of itself. The fact that –

JUDGE JAMES: I follow your testimony. Go ahead Mr. Steiger.

BY MR. STEIGER:

Q Just as one follow-up question to Your Honor's questions to you, I think I'm hearing you say that you told Francois to tear up a letter that you didn't even know what was in that letter.

A No. I said, "Frank, we spoke about this. There is no side agreement. There is no attachment to the modification. There is no addendums. That is it." And then it was like, "Forget it. We won't sign the mod."

Q But you are now testifying that you don't specifically know what was in the letter?

A No. I've seen in the records since, that evidently because Chiesa responded to something –

Q But that's exactly what the Judge asked you.

A Yeah, but I don't know who the letter was addressed to and I don't know the date of the letter. All I know is that a Bob Appellian must have faxed something, that attachment to Chiesa, and then Chiesa responded. And in Chiesa's response I do remember reading the thing that, "Hey, Bankoff sent me this letter yesterday," and that's what I told him was incorrect. Bankoff never sent the letter to Chiesa.

Supreme Court, U.S.
FILED
MAR 15 2004
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(2)

No. 03-1007

In the Supreme Court of the United States

FREEDOM NY, INC., PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

ANTHONY J. STEINMEYER
R. CRAIG GREEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Petitioner and the United States signed a modification to earlier procurement contracts (Modification 25). The court of appeals held that Modification 25 did not incorporate an alleged side agreement between petitioner and the United States. The questions presented are:

1. Whether in holding that Modification 25 did not incorporate the alleged side agreement, the court of appeals failed to defer to credibility determinations made by the Armed Services Board of Contract Appeals (Board).

2. Whether in holding that Modification 25 did not incorporate the alleged side agreement, the court of appeals complied with the statutory standard for review of Board findings.

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In the Supreme Court of the United States

No. 03-1007

FREEDOM NY, INC., PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-26a) is reported at 329 F.3d 1359. The court of appeals' opinion denying rehearing (Pet. App. 27a-31a) is reported at 346 F.3d 1359. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 32a-99a) is reported at 01-2 B.C.A. (CCH) ¶ 31,585.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2003. A petition for rehearing was denied on October 10, 2003 (Pet. App. 31a). The petition for a writ of certiorari was filed on January 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a contract dispute between petitioner Freedom NY, Inc., and the Defense Logistics Agency (DLA), a component of the Department of Defense. Petitioner's predecessor, Freedom Industries, Inc., signed a written contract to provide the government with combat rations. Pet. App. 2a. Disputes later arose concerning petitioner's obligation to meet delivery deadlines and the government's obligation to make progress payments. *Id.* at 4a.

On May 29, 1986, petitioner's president, Henry Thomas, and the government's contracting officer, Frank Bankoff, signed a four-page document designated "Modification No. P00025." Pet. App. 4a-5a, 64a. Modification 25 released the government from "all claims for all happenings * * * relating to the contract." *Id.* at 4a. In exchange, Modification 25 granted petitioner's predecessor an altered delivery schedule and a price increase. *Id.* at 5a. Modification 25 contained an integration clause specifying that "[b]oth parties expressly state that the aforesaid recitals are the complete and total terms and conditions of their Agreement." *Ibid.* (internal quotation marks omitted).

A dispute developed over whether the government and petitioner had entered into a side agreement that became part of Modification 25. Petitioner traces the side agreement to a letter from petitioner dated May 13, 1986, as well as a substantially identical letter from petitioner dated May 28, 1986. Pet. App. 5a. The May 13 letter stated that during contract modification negotiations, "significant matters were discussed relating to Freedom's participation in the [rations] Assembly Program. It was agreed that the understandings reached on those matters were not appropriate for inclusion in

the Mod[ification] but were more appropriately to be addressed in a separate letter." *Id.* at 117a. The letter listed four areas in which the government should assist petitioner and described such assistance as "essential to Freedom's continued participation as a * * * government contractor." *Id.* at 118a. The letter further stated that "[i]t is important that the above understanding be confirmed as soon as practical." *Ibid.*

The day after Modification 25 was signed, DLA's Executive Director, Raymond Chiesa, sent a letter to petitioner's president Thomas rejecting Thomas's suggestion that "parts of our agreement are not reflected in the contract modification." Pet. App. 8a. The Chiesa letter stated: "This is not correct. The agreement reached as a result of our discussion is contained in whole and in its entirety in the contract modification." *Ibid.* The Chiesa letter quoted Modification 25's statement that it embodied "'the complete and total terms and conditions' of the agreement between the parties," and stated that "[a]ny suggestion to the contrary is untrue." C.A. App. 308.

On June 22, 1987, almost one month later, Thomas sent a letter to Chiesa that was nearly identical to the May 13 latter. C.A. App. 316-318. The June 22 letter reiterated that there were understandings relating to petitioner's participation in the rations program and that the understandings were not appropriate for inclusion in the Modification. Pet. App. 66a. The letter again urged "that the above understanding be confirmed as soon as practical." C.A. App. 317-318. Chiesa did not provide such a confirmation.

2. Approximately one year later, the government terminated petitioner's contract for default. Pet. App. 72a. Petitioner appealed to the Armed Services Board of Contract Appeals (Board). Petitioner also sought an

equitable adjustment of $21,959,311 based on alleged breaches of contract and constructive changes by the government. *Ibid.* The government denied petitioner's request, *id.* at 4a, 6a, and petitioner appealed that decision to the Board, *id.* at 73a.

The Board held that the default termination was improper and that it was therefore converted into a termination "for convenience." Pet. App. 6a. The Board rejected petitioner's contract claims, however, holding that the side agreement was not part of Modification 25. *Id.* at 6a-7a. The Board then vacated its decision rejecting petitioner's contract claims. *Id.* at 7a. After a trial directed to petitioner's contract claims, the Board held that the government could not enforce Modification 25's release from liability because the government "did not fulfill its duties under the side agreement" memorialized in Thomas's May 13 and May 28 letter to Chiesa. *Id.* at 94a. The Board found that Thomas's letters were an enforceable "side agreement" to Modification 25 because petitioner would not have signed Modification 25 without agreement to the letters' terms, and because DLA did not notify petitioner of any disagreement with that side agreement until May 30, 1986, when Chiesa sent his letter. *Id.* at 93a-94a.

The Board found that:

> On 29 May 1986, Henry Thomas * * * met with * * * Bankoff. Mr. Thomas had a 28 May 1986 letter to * * * [Chiesa] attached to proposed Modification No. P00025. Mr. Bankoff saw the 28 May date of the letter, and provided an essentially identical * * * 13 May 1986 letter to Mr. Chiesa, which Mr. Thomas attached to Modification No. P00025. Mr. Bankoff said that he would send that letter to

> Mr. Chiesa for approval. * * * DPSC telefaxed to DLA headquarters a copy of the signed 13 May letter. Mr. Thomas heard no objection to the 13 May letter, understood that Mr. Chiesa had agreed, and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025. * * *

Pet. App. 64a. The Board discredited as having "no probative weight" Bankoff's testimony that "he knew nothing of any side agreement." *Id.* at 65a.

3. The court of appeals reversed and remanded, holding that "the Board erred in invalidating Modification 25 on the ground that the government had breached an alleged side agreement." Pet. App. 12a. The court held that "[w]hen a document is completely integrated, no additional terms may be added, whether consistent or inconsistent, through parol evidence." *Id.* at 13a-14a. The court further held that "integration clauses create a strong presumption" that a contract "is a fully integrated agreement." *Ibid.* That presumption may be overcome, the court concluded, only when "the document is obviously incomplete," or "the merger clause was included as a result of fraud or mistake or any other reason to set aside the contract." *Id.* at 15a. The court of appeals concluded that the presumption was not overcome in this case, and that "the circumstances surrounding the negotiation of Modification 25 support a finding of complete integration." *Id.* at 16a. The court explained that "the parties expressly discussed a possible side agreement," petitioner "specifically requested that the alleged side agreement be memorialized," and "Modification 25 as executed contained no reference to any side agreement and

contained an explicit integration clause." *Ibid.* The court of appeals therefore reversed the Board's holding that the government breached the alleged side agreement and remanded for the Board to consider petitioner's other defenses to Modification 25, *id.* at 17a, including "lack of consideration, duress, unconscionability or fraud." *Id.* at 9a.

4. Petitioner sought panel rehearing and rehearing en banc and argued for the first time that Thomas's letters were "physically attached to, and therefore part of" the copy of Modification 25 signed by the government. Reh'g Pet. 2. The court of appeals denied rehearing. Pet. App. 27a-31a. The court of appeals first held that petitioner's argument concerning physical attachment was waived because petitioner raised it for the first time in its petition for rehearing. *Id.* at 29a.

The court of appeals then stated in dicta that, even if petitioner had timely raised the argument, petitioner would not prevail on the merits. Pet. App. 29a. The court of appeals read the Board as finding that Mr. Thomas had attached the letters "to *his* copies of Modification 25," not to the copy that both parties signed. *Ibid.* The court of appeals held that one party may not bind the other to a contract by unilaterally attaching a document to a contract, unless the other party later signs or ratifies the attachment. *Ibid.*

The court of appeals also observed that two writings may form a unified contract only if the documents "clearly indicate" the parties' intention that they be considered together as a single transaction. Pet. App. 29a (citing Restatement (Second) of Contracts § 132 (1981)). The court explained that "in sharp contrast to this requirement," petitioner's letters stated that they were "*not* part of Modification 25," *ibid.*, and "Modification 25 itself contains an integration clause."

Id. at 30a. The court concluded that, in those circumstances, Modification 25 "cannot be read to make the letters a part of the contract." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-14) that the court of appeals erred in rejecting Board findings that were based on the Board's credibility determinations. For several reasons, that contention does not warrant review by this Court. First, the court of appeals' decision is interlocutory. Second, petitioner waived the argument that underlies the questions it seeks to present. And third, the court did not reject any of the Board's factual findings or credibility determinations. Instead, it correctly held that the Board's decision was based its decision on a faulty legal analysis that failed to give sufficient weight to the effect of the integration clause in Modification 25.

1. As a threshold matter, the court of appeals did not issue a final judgment in this case. Instead, the court vacated the Board's decision and remanded for further proceedings, including adjudication of such defenses to Modification 25 as "lack of consideration, duress, unconscionability or fraud." Pet. App. 9a, 17a. This Court generally awaits final judgment before exercising its certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). The interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); Robert L. Stern, et al., *Supreme Court*

Practice § 4.18, at 196 n.60 (7th ed. 1993). To deny certiorari at this time will not preclude petitioner from raising any properly preserved issues in a petition after the entry of final judgment. The practice of deferring review until final judgment promotes judicial efficiency by ensuring that, if judgment issues against petitioner, any and all legal claims may be raised in a single, consolidated petition before this Court.

2. Certiorari is also unwarranted because petitioner waived the argument that underlies the questions it seeks to present. Petitioner's contention that the court of appeals failed to defer to the Board's findings and credibility determinations is based largely on petitioner's assertion that the May 13 and May 28 letters were physically attached to the copy of Modification 25 that the government signed. Pet. 4-5, 8. The court of appeals, however, concluded that petitioner waived that argument by failing to present it until its petition for rehearing. Pet. App. 29a. That waiver determination stands as an independent barrier to the consideration of the questions that petitioner seeks to present, and petitioner has failed to raise any distinct question that challenges the court of appeals' waiver determination. See Pet. i.

Furthermore, the application of local waiver rules lies within the court of appeals' discretion, cf. *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90, 100 n.5 (1991), and petitioner has failed to demonstrate that the court of appeals abused that discretion when it found that petitioner waived the argument that the May 13 and May 28 letters were physically attached to the modification agreement that the government signed.

Petitioner claims that it "could not have 'waived' its argument because it was the appellee in the court of appeals." Pet. 9. But petitioner was also a cross-

appellant, and in any event it cites no authority for the proposition that an appellate court abuses its discretion when it requires appellees to present their arguments in support of the judgment in a timely manner. Petitioner also asserts that it brought the relevant Board findings to the court's attention in its original briefs. But an appellate court may reasonably decide that merely citing a Board finding is insufficient to bring to the court's attention a legal argument in support of a judgment. In any event, the court of appeals' fact-specific application of waiver principles does not present any issue of recurring importance that would warrant this Court's review.

3. Review is also unwarranted in this case because the court of appeals did not base its decision on the rejection of any of the Board's findings or credibility determinations. While petitioner asserts that the court of appeals rejected the Board's finding that the May 13 and May 28 letters were physically attached to the agreement that the government signed, the court of appeals, in fact, simply disagreed with petitioner's characterization of the Board's finding. The court of appeals read the Board to have found only that Mr. Thomas "had attached the May 13 and May 28 letters * * * to *his copies* of Modification 25." Pet. App. 29a (emphasis added).

The court's interpretation of the Board's finding is a reasonable one. While the finding states that the May 13 and May 28 letters were attached to a copy of the agreement, it does not state that they were attached to the agreement *that the government signed.* See Pet. App. 64a. The Board's opinion described the letters as reflecting a "side agreement," *id.* at 93a-94a, strongly suggesting that it viewed the letters as formally separated from Modification 25 itself. And in finding that

the "side agreement" was enforceable, the Board did not rely on its physical attachment to Modification 25, but on two other findings: that petitioner "would not have signed" Modification 25 without the "side agreement" and that "DLA did not notify [petitioner] of any disagreement" until May 30, 1986. *Ibid.* It seems most unlikely that the Board would have based its decision on those two findings had it concluded that the May 13 and May 28 letters were attached to Modification 25 when the government signed it. In any event, the disagreement between petitioner and the court of appeals on the nature of the Board's finding is fact-specific and does not warrant review.

Petitioner also errs in contending that the court of appeals overturned the Board's determinations that Thomas was credible and that Bankoff was not. The court of appeals based its decision on applicable legal principles and the terms of the relevant documents, not on a disagreement with the Board's credibility determinations. In particular, the court held that an integration clause creates a strong presumption that a contract is a fully integrated agreement, Pet. App. 14a, and the terms of the relevant documents in this case confirm that the contract is fully integrated. As the court explained, Modification 25 contains an integration clause, nothing in Modification 25 refers to a side agreement, and the May 13 and May 28 letters expressly state that they are not part of Modification 25. *Id.* at 29a-30a. Because the court of appeals reversed the Board based on its disagreement with the Board's legal analysis and not because it disagreed with the Board's credibility and factual determinations, there is no foundation for either of the questions that petitioner seeks to present. Both of those questions are premised on the incorrect assertion that the court of appeals set

aside Board findings and credibility determinations. See Pet. i.

4. Petitioner also contends (Pet. 14-16) that the court of appeals misapplied principles of contract law. That contention is not within either of petitioner's two questions presented. See Pet. i. It therefore is not properly presented here.

In any event, the court of appeals applied well established principles of contract law in reaching its conclusion. In particular, the court correctly invoked the principle that an integration clause creates a strong presumption that a contract is a fully integrated agreement. Pet. App. 14a. That presumption is supported by the leading authorities, including Williston and the Restatement. *Id.* at 15a & n.3. Petitioner cites authorities for the proposition that other evidence may, in some circumstances, overcome the effect of an integration clause. Pet. 14-16. But none of those authorities suggests that the presumption could be overcome in a case like this where the contract at issue does not refer to any other agreement and the party seeking to add to the contract is relying on a letter that describes itself as "separate." In any event, the court of appeals' fact-specific application of the established presumption in favor of giving effect to integration clauses does not warrant review.

Because of the highly unusual context in which this case arises, petitioner is also incorrect in contending that the court of appeals' decision will significantly affect other government contract cases. Pet. 17. Contrary to petitioner's suggestion, *ibid.*, the court did not hold that documents attached to contract modifications may not become part of the contract. Rather, as discussed above, the court held that petitioner waived any argument based on the attachment of the documents to

the contract, and that, in any event, the documents upon which petitioner relies were not attached to the contract that the government signed. Those conclusions are highly fact-specific and do not present any recurring issue warranting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FREEDOM NY, INC.,

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DONALD H. RUMSFELD,
SECRETARY OF DEFENSE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

The three reasons stated by the Solicitor General for denying the writ of certiorari are specious.

I.

THIS COURT FREQUENTLY REVIEWS DECISIONS OF COURTS OF APPEALS THAT REVERSE FINAL JUDGMENTS OF DISTRICT COURTS

The Solicitor General's initial assertion is that the decision of the court below is "interlocutory" and should therefore not be reviewed under the prudential principle that this Court "generally awaits final judgment before exercising its certiorari jurisdiction." Brief for the Respondent in Opposition ("Gov't Br.") 7-8. In fact, the decision that was before the court below was, in all respects, a "final judgment" and was not, in any fashion, "interlocutory." It was entered after a full trial on the merits before the Armed Services Board of Contract Appeals, and it fully concluded the litigation that had been initiated with the filing of the petitioner's complaint.

Additional proceedings may be necessary only because the court below erroneously vacated a final judgment, thereby leaving for possible future resolution issues that were not reached in the initial decision of the Armed Services Board of Contract Appeals. If, as petitioner contends, the ruling of the appellate court is reversed, the final judgment will be reinstated and the litigation will be over.

This is not, therefore, the procedural posture contemplated by the prudential rule discussed in R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18, pp. 258-261 (8th ed. 2002), or in Justice Scalia's concurring memorandum on the denial of certiorari in

Virginia Military Institute v. United States, 508 U.S. 946 (1993). When a trial court's judgment is itself interlocutory or when, as was true in the *Virginia Military Institute* case or in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (which is routinely cited in support of the same proposition), substantial questions relating to the remedy below remain unresolved, this Court stays its hand until the litigation is finally concluded. In those instances, there must be further proceedings in the lower court irrespective of the validity of the appellate court's determination. It is possible that the resolution of those additional proceedings will obviate the necessity for further review by this Court. In addition, review by this Court is, in these circumstances, premature prior to the trial court's disposition of issues that the trial court will have to consider in any event.

But the rationale of that rule is wholly inapplicable to a case in which the trial court's judgment is "final" in every respect and requires no additional proceedings whatever, and where the only obstacle to immediate enforcement of that final judgment is a reversal by an appellate court based on a challenged legal conclusion. Timely review by this Court and reversal of the appellate court's decision, resulting in reinstatement of the final judgment, will conserve judicial resources and make it unnecessary for the parties to engage in costly and burdensome litigation over issues that need not be reached.

In the 2002 Term of Court, for example, this Court decided *Dole Food Company v. Patrickson*, 538 U.S. 468 (2003) (court of appeals' reversal of dismissal and remand for further proceedings); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (court of

appeals' reversal of summary judgment for defendant and remand for further proceedings); *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (court of appeals' reversal of summary judgment for defendants and remand for further proceedings); and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (court of appeals' reversal of dismissal of complaint and remand for further proceedings). In each of these cases, final judgments of the trial court were reversed by the court of appeals and the case was remanded for additional proceedings.

And in the preceding Term this Court granted certiorari in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), in which a final judgment for the plaintiff was reversed and remanded by the Federal Circuit – precisely the procedural posture of this case. It was not suggested that this Court must await the outcome of the remand proceedings before reviewing the judgment of the court of appeals. If the rule invoked by the Solicitor General were applicable to all cases in which the court of appeals has remanded for further proceedings, the Court should never have agreed to hear the cases we have just cited and discussed until the proceedings contemplated by the appellate decision had been concluded.

If, as petitioner contends, the Federal Circuit erred in vacating the final judgment of the Armed Services Board of Contract Appeals, the Federal Circuit's decision should be reversed and the ASBCA's judgment should be enforced. That decision can and should be rendered at this juncture of the litigation and should not be delayed merely because the Federal Circuit remanded the case for consideration of other issues that need never be resolved.

II.

NO RATIONAL "LOCAL WAIVER RULE" REQUIRES AN APPELLEE TO ANTICIPATE A COURT'S REVERSAL ON GROUNDS NOT ARGUED IN AN APPELLANT'S BRIEF WITH A FULL-FLEDGED PRESENTATION OF AN ALTERNATIVE GROUND TO SUSTAIN THE LOWER COURT'S DECISION

The Federal Circuit plainly erred when, in denying rehearing partly on "waiver" grounds, it cited precedents that held that "an issue not raised *by an appellant* in its opening brief . . . is waived." Petition Appendix B, p. 29a (emphasis added). Since petitioner was *appellee* in the Federal Circuit (and was a cross-appellant on issues that are not germane to this petition), the cited precedents are clearly inapplicable. Policy and precedent clearly establish that an appellant has waived arguments that he does not assert in his presentation of the grounds for reversal. *E.g., Morfin v. City of East Chicago,* 349 F.3d 989, 1000 (7th Cir. 2003); *United States v. Taylor,* 339 F.3d 973, 977 (D.C. Cir. 2003); *Bickel v. Korean Air Lines Co.,* 96 F.3d 151, 153 (6th Cir. 1996).

The situation of an appellee, who is defending the judgment below against the arguments made by his adversary, is entirely different. If there are alternative grounds to support that judgment, he may -- and probably should -- present them in his responsive brief. But he surely has no obligation in that brief to counter, with an extended discussion of the facts and law, arguments that the appellant's brief does *not* make -- merely on the hypothetical possibility that the appellate court will seize on one such argument as a ground for reversing the judgment below.

That is what happened in this case. As we noted in our Petition (p. 7), the government's appeal to the Federal Circuit did not challenge the ASBCA's conclusion regarding Modification No. 25. In its reply brief – *for the very first time in its appeal* – the government asserted briefly that any "alleged oral side agreement" was "a nullity." Although the validity of the "side agreement" was not, therefore, directly challenged on the government's appeal, the Federal Circuit found the "side agreement" to be invalid on grounds that had not been argued by the government. It was in this context that, on rehearing, the panel of the Federal Circuit asserted astonishingly that the petitioner had "waived" its legal response to the unanticipated *ratio decidendi* of the Federal Circuit by not presenting a full-fledged defense of the validity of the "side agreement" in its appellate briefs.

The Solicitor General avoids this remarkable "waiver" ruling by asserting that "the application of local waiver rules lies within the court of appeals' discretion" and that the Federal Circuit could have decided that it was "insufficient" merely to cite the Board's finding in the appellee's brief. Gov't Br. 8-9. The Solicitor General fails to cite a "local waiver rule" that was, in fact, applicable to these facts and on which the Federal Circuit allegedly exercised some "discretion." We submit there is no such "local waiver rule" because, in the circumstances of this case, it would be plainly irrational, unjust, and an abuse of discretion to foreclose an appellee from bringing to the appellate court's attention on petition for rehearing the detailed reasons why its *sua sponte* decision is wrong as a matter of fact and law.

III.

IT IS NOT A "REASONABLE INTERPRETATION" OF THE ASBCA'S FINDINGS TO READ THEM AS FINDING THAT THE "SIDE AGREEMENT" WAS "SEPARATED FROM MODIFICATION 25"

The Solicitor General asserts that the Federal Circuit did not reject the Board's findings because the ASBCA's findings could be interpreted as concluding that the letters comprising the "side agreement" were not "attached to Modification 25 when the government signed it." Gov't Br. 9-10. That reading of the ASBCA findings is absolutely untenable.

Paragraph 93 of the ASBCA's Opinion (Pet. App. C, p. 64a) reads as follows:

> 93. On 29 May 1986, Henry Thomas and consultant Francois met with PCO Bankoff. Mr. Thomas had a 28 May 1986 letter to DLA's R. Chiesa (ex. G-40), conforming in substance to the 2 May 1986 version, attached to proposed Modification No. P00025 (P00025). Mr. Bankoff saw the 28 May date of that letter, and provided an essentially identical FNY 13 May 1986 letter to Mr. Chiesa, which Mr. Thomas attached to Modification No. P00025. Mr. Bankoff said that he would send that letter to Mr. Chiesa for approval. At 11:00 a.m. DPSC telefaxed to DLA headquarters a copy of the signed 13 May letter. Mr. Thomas heard no objection to the 13 May letter, understood that Mr. Chiesa

> had agreed, and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025. (AR4, tab M25; ex. FT280; tr. 643-51, 2047-49)

The second sentence of the Finding declares that the letter reciting the additional terms was "attached to proposed Modification No. P00025" when Mr. Thomas brought it to the meeting of May 29. It also recites that PCO Bankoff "provided" an "essentially identical" letter, and that Mr. Thomas "attached" that "essentially identical" letter to the Modification. PCO Bankoff then sent "that letter" to Mr. Chiesa of the Defense Logistics Agency ("DLA") "for approval." The ASBCA determined that Mr. Thomas signed Modification No. 25 because the silence of DLA manifested its agreement to the letter that had been "attached" and was faxed to DLA. And Paragraph 94 of the ASBCA's Opinion stated that the ASBCA gave "no probative weight" to PCO Bankoff's "denial of the 'side agreement' *attached to* P00025" (emphasis added).

At no point in these ASBCA findings is it remotely suggested that the additional terms were "attached" only to Mr. Thomas' documents. According to the ASBCA's findings, the "side agreement" was "attached" by Mr. Thomas to Modification No. 25 before he brought that document to the meeting of May 29. The additional agreement was seen and read by PCO Bankoff who provided "an essentially identical" letter that Mr. Thomas "attached" again to Modification No. 25. After the agreement was faxed to DLA, Modification No. 25, with an "attached" side agreement, was signed by PCO Bankoff.

The plain meaning of the ASBCA findings is that the side agreement was attached to the Modification. If the Federal Circuit concluded that it was attached only to Mr. Thomas' copy, that court necessarily overruled and rejected the findings of the ASBCA. There is no reasonable reading of the ASBCA's findings that would support the position of the Solicitor General.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the writ should be granted. The Court may choose to reverse the decision below summarily on the authority of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

Respectfully submitted,

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No. 03-1007

IN THE
Supreme Court of the United States

FREEDOM NY, INC.,
Petitioner,

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *OF AMICUS CURIAE* THE HUBZONE CONTRACTORS NATIONAL COUNCIL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Federal Circuit erred when it departed, without explanation, from the established standards for review of credibility findings made by the Armed Services Board of Contract Appeals.

2. Whether the Federal Circuit erred when it misconstrued the impact of an integration clause on a contract Modification that was composed of two integrally related documents that, by their plain terms, were intended to be read together.

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OPINIONS BELOW

The decisions below consist of the opinion of the Court of Appeals for the Federal Circuit, reported at 329 F.3d 1320 (Fed. Cir. 2003); its opinion on Petition for Rehearing, 346 F.3d 1359 (Fed. Cir. 2003); and the decision of the Armed Services Board of Contract Appeals reported at 01-2 BCA ¶31,585.

INTEREST OF AMICUS [1]

Amicus Curiae, the HUBZone Contractors National Council (the Council) is a District of Columbia Nonprofit Corporation. Its principle goal is to insure that its membership receives the optimal benefits of the HUBZone Empowerment Contracting Program created by the HUBZone Act of 1997. This statute provides contracting assistance, including federal procurement set-asides, to qualified small businesses located in historically underutilized business zones (HUBZones) in an effort to create employment opportunities, investment, and economic development in those areas.

The Council seeks public policies which support, enhance and expand business opportunities for firms which have been certified as HUBZones by the Small Business Administration (SBA). Regular memberships in the Council are available to firms certified as HUBZone small business concerns by the SBA In order to be so certified, a small business must be 100% owned by U.S. citizens, have its

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3 Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the brief's preparation or submission.

principle place of business located in a HUBZone, and have at least 35% of its employees residing within a HUBZone.

INTRODUCTION

The Council supports the Petitioner's argument that the Court of Appeals for the Federal Circuit erred in its partial reversal and remand of the Armed Services Board of Contract Appeals' decision granting relief to the Petitioner.

The Council submits this brief in support of the Petition for a *Writ of Certiorari* to the Federal Circuit in order to make the Supreme Court aware of the importance of the decision below and its potential to do significant damage to a wide range of Government contractors, particularly small businesses that have the least resources available to effectively protect themselves against encroachments on their contractual rights by the government.

STATEMENT OF THE CASE

In 1983, the Petitioner, Freedom NY, Inc. (FNY) was awarded a contract by the Defense Logistics Agency (DLA) for the production of a variety of Meal, Ready To Eat (MRE) combat rations under DLA's Industrial Preparedness Producer Program. In 1987, the contract was terminated for default. Joint Appendix (JA) 372-74.

Thereafter, FNY submitted a claim in excess of $21 million against DLA alleging, among other things, that a series of egregious government breaches and constructive changes—including repeated unexcused failures to make full and timely progress payments, undue interference with contract performance, imposing performance standards higher than those specified in the contract, and improperly

recouping monies by withholding progress payments —had unduly hindered FNY's performance of the contract and ultimately forced it to cease doing business. (JA 27.)

1. The Armed Services Board of Contract Appeals Proceedings

FNY duly appealed the denial of its claim by the DLA to the Armed Services Board of Contract Appeals (ASBCA) and the case was assigned docket number 43965. In May,1996, the ASBCA ruled that the default termination of FNY's contract was improper. *Freedom NY, Inc. ASBCA No. 35671, 96-2 BCA ¶ 28,328.* JA 372-74. In August of 1996, the ASBCA vacated that part of its decision that had denied FNY's breach claim and reinstated appeal number 43965. *Freedom NY, Inc. ASBCA No. 35671, 96-2 BCA ¶ 28,502.*

Subsequently, in December, 2000 the parties mutually agreed upon the monies due FNY as its convenience termination settlement, subject to appropriate adjustment based upon the ASBCA's ruling in the pending appeal. In August, 2001 the ASBCA rendered a decision which held the government liable for multiple breaches and concluded that FNY was entitled to a contract price adjustment of $5,907,654, plus interest in excess of $4 million. *Freedom New York, Inc. ASBCA 43965, 01-2 BCA ¶31,585.* App. C pp. 98a-99a.

The ASBCA's decision, rendered after a trial lasting 11 days, was carefully and thoughtfully crafted by Judge James. It is 42 pages long, contains 133 detailed findings of fact and was reviewed and concurred in by the ASBCA's Acting Chairman and by one of its Vice Chairmen. A pivotal aspect of the decision relates to contract Modification 25, its contents and the circumstances of its execution.

Modification 25 was, in essence, a release executed by the parties in May, 1986. By its terms, FNY withdrew its claim of nearly $3.5 million against DLA, received some relief on the timing of deliveries for the undelivered balance of MREs, and agreed to several relatively insignificant price adjustments.

Modification 25 concluded with integration language stating, in part, that "the aforesaid recitals are the complete and total terms" of the parties' agreement and were entered into "free from duress or coercion."

Judge James found as a fact that Modification 25 had appended to it a May 13, 1986 side letter to DLA from FNY that was faxed by DLA contracting officer Bankoff to DLA headquarters for comment and review prior to the execution of Modification 25, and which was not objected to by any DLA officials. The side letter provided the rationale and conditions essential to explaining FNY's willingness to waive a its monetary claim against DLA. AR4, tab M25; ex. FT 280; tr. 643-51, 2047-49.

In sum, the side letter agreed to the waiver of FNY's claim subject to several express conditions, namely (a) negotiation of an additional "fair and reasonable" MRE contract based upon FNY 's "existing mobilization capacity;" (b) processing by DLA and FNY of a guaranteed loan; and (c) assistance to FNY in obtaining contracts under the 8(a) program.

The circumstances, as described above, surrounding Modification 25's execution and the side letter that fully described the parties' intent were attested to by FNY's President and corroborated by its chief consultant. Judge James found as a fact that FNY's President ". . .heard no objection to the 13 May letter, understood that [DLA

headquarters] had agreed and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025."

At the trial, Mr. Bankoff in the course of his lengthy, disjointed and rambling testimony, cavalierly denied all of the above events. He testified that, "there is no side agreement. There is no attachment to the modification." (App. G, p. 125a, 128a.) Judge James having had the opportunity to observe Mr. Bankoff throughout the proceedings and after listening to and observing him testify, categorically rejected his denials. Judge James found as a fact:

> "Considering the documents in evidence and Mr. Bankoff's demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony, we attach no probative weight to Mr. Bankoff's denial of the 'side agreement' attached to P00025."

(App. C, p. 65a.)

Citing *Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980)* ("the Government cannot enforce the benefits of the settlement agreement against the contractor, and, at the same time, vary its obligations thereunder…."), Judge James concluded that DLA, " . . .cannot enforce the Modification No. P00025 release provision, since it did not fulfill its duties under the side agreement thereto." Accordingly, his decision, as discussed above, resulted in an award to FNY in excess of $10 million. (App. C, pp. 93a-94a.)

2. The Court of Appeals for the Federal Circuit Proceedings

The court of appeals (while affirming the ASBCA's rejection on the grounds of duress, of Modification 29 which is not at issue here) reversed and remanded the ASBCA's holding with respect to Modification 25. Its decision was, in essence, based upon its conclusion that the integration language contained in Modification 25 and mentioned earlier ("The above recitals are the complete and total terms" of the parties' agreement) was controlling and that therefore "Modification 25 was an integrated document to which no additional terms could be added through parol evidence . . ." (App. A, p. 17a.)

The court of appeals was similarly unpersuaded by the ASBCA's findings that Mr. Bankoff's testimony was not credible and that the side letter to Modification 25 was, in fact, transmitted to DLA for its review and comment prior to the execution of the Modification and, under the circumstances, formed a part of the Modification's terms and conditions. In its decision, the court twice referred to Bankoff's after-the-fact comments with respect to the side letter (he said "there is no side agreement. There is no attachment to the modification") the first time without making any reference to Judge James' finding that Bankoff had been disingenuous in his testimony before the ASBCA. (App. A pp. 17a-21a.)

The second time that it raised the subject, the court mentioned - without any specific comment - that the ASBCA had "credited" the testimony of FNY's President with respect to the circumstances surrounding the side letter and modification 25 and that the Board had rejected Bankoff's disavowals because of his " demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous

testimony." (App. A, pp. 1[illegible]a-21a *infra*.) Certainly, by its reversal and remand of th[illegible] ASBCA's conclusions with respect to Modification 2[illegible], the court disregarded the ASBCA's findings concern[illegible]ng FNY's side letter and its approval by DLA and the we[illegible]ght to be accorded to Bankoff's disclaimers.

Subsequently, FNY fi[illegible]ed a petition for rehearing with the court, arguing that the si[illegible]e letter constituted an integral part of Modification 25, was [illegible]so considered by the ASBCA, and should be confirmed as s[illegible]ch by the court of appeals.

The court rejected FNY's contention on three grounds:

First, that FNY had w[illegible]aived this argument since it did not raise it in its opening [illegible]brief. (App. B, p. 29a *infra*.) Obviously, since FNY was [illegible]the Appellee at the court of appeals, this ground is incorre[illegible]ct.

Secondly, the court opined that simply attaching one document to another—without more—does not bind the other party to the attached document's conditions. *Id.* We agree. In this case, however, the two documents formed part of one transaction (as the ASBCA specifically found). As the court, citing the Restatement (Second) of Contracts, §132 cmt. c (1981), noted in its opinion, "the documents must clearly indicate that the parties intended that they be considered together as a single document." This is precisely what occurred here and what was found as a fact by the ASBCA.

Third, the court misinterpreted the language used by FNY in the side letter which stated, in part, that, "It was agreed that the understandings reached on those matters were not appropriate for inclusion in the Mod[ification] but were

more appropriately to be addressed in a separate letter." The court concluded that this language expressly meant that the side letter was "not part of Modification 25"(emphasis in original). *Id. Amicus* strongly believes otherwise. The side letter was over three pages long and was not written in "legalese." The foregoing statement is readily susceptible to the interpretation that because of its length and more relaxed tone, the side letter was not appropriate for physical inclusion in the body of Modification 25 although even a cursory reading of the documents demonstrates that the Modification and the side letter were integrally related.

ARGUMENT

1. THE FEDERAL CIRCUIT'S DECISIONS MISAPPLIED THE STANDARD OF REVIEW APPLICABLE TO A BOARD OF CONTRACT APPEAL'S FINDINGS OF FACT.

Petitioner's brief has already ably discussed the misapplication by the court below of the standard of review to be applied to the ASBCA's findings of fact and its observations will not be repeated here. *Amicus* wishes only to underscore the seriousness of the court's error when, almost casually and without comment or explanation, it discredited the ASBCA's critical findings regarding the credibility of the DLA's Mr. Bankoff and the circumstances surrounding the approval and submission of the Modification 25 side letter.

Regrettably, the court below ignored this Court's instruction in *Anderson v. City of Bessemer City, 470 U.S. 564 (1985),* that where findings are based on a witness's credibility they are entitled to even greater than usual deference because only the trial judge who has personally observed a witness (such as Bankoff) "...can be aware of the

variations in demeanor and tone of voice that bear so heavily on a listener's understanding and belief in what was said." (470 U.S. at 571). Unfortunately, the court disregarded even stronger admonitions that mandate against disturbing a trial court's credibility findings, "unless those findings shock the conscience," *Golden Eagle Spotting Co., v. Brewery Drives and Helpers, Local Union 133, 93 F.3d 468 (8th Cir. 1996)*, or unless they are, "hopelessly incredible or self-contradictory," *Quazite Division of Morrison Molded Fiberglass Co. v. NLRB, 87 F. 3d 493(D.C. Cir. 1996).* Clearly, that was not the case here and just as clearly, the court's inexplicable dismissal of these key findings was without any sound legal basis and must be corrected.

2. THE FEDERAL CIRCUIT'S DECISIONS IGNORE SEVERAL TRADITIONAL RULES OF CONTRACT INTERPRETATION.

The ASBCA properly construed FNY's side letter as an integral part of Modification 25, duly reviewed and approved by DLA before the Modification was executed and thus not subject to any limitations that might be imposed by the Modification's integration language. This is made clear by a number of factors, including the side letter's reference: (a) to the parties' ongoing dispute, and (b) to the parties' tentative agreement to settle FNY's monetary claim against DLA. Moreover, the side letter, by its own terms, stated that it was part of Modification 25:

> Modification to be designated (the Mod) P00021 [2] . . have agreed to settle Freedom's claim against DLA . . . .That settlement is reflected in part in the contract modification which is attached. The terms

[2] Corrected in the later version of the side letter to read P00025.

> and conditions of which have been agreed to by Freedom and DPSC. (emphasis added)

(Appendix F, pp. 115a-119a).

The testimony of FNY's President further clarifies this issue. During the trial the following interchange described the situation at the time that Modification 25 was executed:

> Q. Are you saying the original version of this letter was addressed to Mr. Bankoff?
> A. Yes. It was addressed to Bankoff. But since Bankoff had referred the whole thing up the [*sic*] DLA headquarters for resolution, . . . then Mr. Apellean says, that this was negotiated by the highest person at DLA in Contracting who had authority to do something here . . .[and] that this document should be attached to the modification and then handed to the PCO as one document. (emphasis added).

(Appendix D, p. 101a).

Although the court below had the rule right, it erred in its application of the rule to the side letter. Properly construed, the integrated document here consisted of both the side letter and Modification 25.

When a court interprets contract language, it should initially attempt to reach the meaning that would be reached by a "reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with making the written instrument" *17 Am. Jur. 2d § 243 (2d Ed. 1964)*. If this rule is applied to the question of what documents constituted Modification 25, the answer is immediately obvious.

Without the detail and additional conditions imposed by the side letter, Modification 25 is nothing more than a unilateral release by FNY of its claim against DLA with minimal consideration from DLA. It is only when the two documents are read together that they make sense from either a business or logical viewpoint. The court below had an obligation to interpret Modification 25, "in a manner that gives meaning to all its provisions and makes sense." *McAbee Const. Inc. v. U.S. 97 F. 3d 1431, 1435 (Fed. Cir. 1996).* And, as the Supreme Court has observed "business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." *N .German Lloyd v. Guar. Trust Co., 244 U.S. 12, 24 (1917).*

Finally, the court below should have considered the practical approach taken in another contract dispute where a court observed that if, "language of a contract is open to an interpretation which is reasonable and in accordance with the general purpose of the parties, the hardship of a different interpretation is strong ground for belief that such a meaning was not intended." *Sorenson v. J.H. Lawrence Co., 79 A. 2d 382 (Md. 1981).*

Unfortunately, here the court allowed itself to be swayed by the after-the-fact disavowal of an individual whose honesty had been entirely discredited by the trial Judge who personally observed his testimony.

3. THE FEDERAL CIRCUIT'S DECISIONS WOULD CREATE CONFUSION AND UNCERTAINTY WITHIN THE RANKS OF GOVERNMENT CONTRACTORS AND WOULD BE ESPECIALLY HARMFUL TO SMALL BUSINESSES THAT LACK THE RESOURCES TO CONTEST ARBITRARY GOVERNMENT ACTIONS.

Contractors doing business with the government are entitled to a reasonable degree of certainty that their contract disputes will be resolved by the consistent application of rules of review. The standard of review by an appellate court of a board of contract appeals' finding of fact is a critical element of this review process and it has had a lengthy history of virtually uniform treatment.

If the federal circuit's unexplained deviation from these established norms is allowed to stand, contractors - especially small businesses without the resources needed to retain legal counsel - would be faced with uncertainty and with the likelihood of significant expenditures that they can ill afford.

The Council is particularly concerned that small business owners, particularly its membership, who are trying to follow the Congressional mandate to bring federal government business and jobs to Historically Underutilized Business Zones, and who do not have the sophistication and resources of some larger government contractors, may be seriously disadvantaged if they cannot rely on the judicial and administrative forums to resolve disputes in an orderly and consistent manner.

CONCLUSION

The Council has demonstrated the several instances in which the federal circuit plainly and materially erred in its review of the ASBCA's decision.

The Council joins petitioner in urging that the Petition for Issuance of a Writ of Certiorari be granted and agrees with petitioner's suggestion that this court might choose to reverse the decision below summarily in view of

the federal circuit's disregard of this Court's decision in *Anderson v. City of BessemerCity,* 470 U.S. 564 (1985).

Respectfully submitted,

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